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The Influence of New Weapons Technology, Human Rights and Emerging Actors

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ISBN 978-94-6265-001-5 ISBN 978-94-6265-002-2 (eBook)
DOI 10.1007/978-94-6265-002-2

Library of Congress Control Number: 2014931206

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

To my parents and to my wife
Thank you for everything

Preface

In this, the second decade of the twenty-first century, the law relating to conflict is confronted by a number of challenges that this book seeks to identify and to discuss. It was a deliberate decision that the book should cover the whole spectrum of conflict from general war to situations below the armed conflict threshold. The title 'Conflict Law' should be seen in that light.

Old legal certainties based on a bi-polar system of war and peace have given way to ambiguities as we apply the current, more extensive legal spectrum of conflict to contemporary transnational conflicts involving loosely affiliated armed groups. Gaps in treaty law governing armed conflict seem unlikely to be filled in the short term, so what is the legal status of the numerous writings of Experts that we have seen in recent decades? The Internet offers a new environment in which hostilities can be conducted and for which there are no treaty rules of the game. Technological advance seems likely to produce, in both the real and virtual environments, increasing numbers of automated and, in due course, autonomous weapons that make their own attack decisions, which the machine then implements. How does a body of law written on the implicit premise of human decision-making cope with the onward march of the empowered machine?

Weapons technology continues to advance at a rapid pace, but states are obliged to apply existing legal principles when determining the legitimacy of the new tools of war. Determining how the rules should be applied to cutting edge technologies, such as autonomous, cyber, nanotechnology and outer space weapons, is going to be an important undertaking. Remote attack techniques that render the attacker invulnerable, effects-based operational thinking that seeks to expand the envelope of permissible targeting, the persistent issues associated with asymmetry and a likely depopulation of the battlefield seem likely to cause some to question deep-rooted legal principles. Despite these technological developments, however, people will remain central to the conduct of hostilities, although their roles may change over time and increasing involvement of civilians may become legally problematic.

Detention operations have attracted more than their fair share of controversy in recent years. Though many prescriptive rules regulate important detention matters, this is arguably an area where gaps in the treaty law of armed conflict bite and there are useful initiatives designed to achieve a common understanding as to the rules that are to be applied. While the International Courts have pronounced on the

relationship between human rights law and the law of armed conflict, aspects of their collective judgments may be expected to pose practical difficulties for commanders and other decision-makers. While the terminology describing that relationship increases, the pressing need is for a clear expression of the rules that are to be applied in foreseeable circumstances.

If these challenges and controversies were not enough, battles these days are fought in the glare of a media and legal spotlight. Instant reporting by mass and individual media coupled with legal challenges before a broad selection of courts and other fora ensure that the decisions of commanders and others, often undertaken in the heat of battle and with minimal opportunity for reflection and advice, will be publically debated and criticised soon after the event with all the attendant strategic implications.

These are just some of the issues that caused me to write this book. Academic discussion of the finer points of the law is a legitimate pursuit; indeed, the reader will find any amount of such discussion in the following pages. However, the law relating to conflict is of vital practical importance as a protector of the victims, the wounded, the sick, the civilians, the prisoners and so on. This is its essential function and academic debate must not be allowed to obscure that purpose. The book therefore seeks to adopt a practical approach to the numerous complex problems it tackles and, where possible, seeks operable solutions.

It would not have been possible to write this book without the encouragement, assistance and guidance of many people and I thank them all. Particular thanks are due to Prof. Rain Ottis of Tallinn University for his instructive and most helpful comments on numerous technical issues associated with cyber operations and to Prof. Francoise Hampson of the University of Essex for her most helpful comments on aspects of the human rights discussion. My thanks also go to Merel Alstein for inspiring me to write the book and for her clear and helpful advice as to its content and direction.

While these various comments and suggestions have been of enormous assistance to the author and have undoubtedly greatly improved the book, it must be stressed that any errors remain entirely the author's responsibility.

Finally, the author wishes to thank his wife for her patience and reassurance at numerous pivotal moments during the writing of the book.

October 2013 William H. Boothby

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1.1 Placing the Discussion in Context

At some point in the study of the law relating to conflict the proverbial 'penny' starts to drop, the realization, if you prefer this turn of phrase, finally dawns that both the law and the challenges it seeks to confront are dynamic, and that they do not always move coherently with one another. That appreciation causes one to wonder what the relationship is between the issues that conflict law seeks to address and the legal rules that are currently in place. In the following pages, we will explore that evolving relationship as it applies to some specific classes of activity associated with conflict, and will then try to draw some conclusions.

The author's 30 years of service as an RAF lawyer has given him an understanding of how the law works in practice and an appreciation of the needs of armed forces personnel as they fulfill their difficult operational tasks within the framework of applicable law. That understanding and appreciation will inform and define the scope of the discussion that lies ahead so what will emerge is,

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_1,

inevitably, a personal view firmly centred on law. The reader will detect a number of recurring themes. First, the author has a fundamental confidence that the core principles of the law of armed conflict,[1] and indeed of many of its detailed rules, can be applied to and can deal satisfactorily with new developments in the nature of armed conflict and in the way in which it is conducted. Second, pragmatism, and sometimes creativity, are required to demonstrate the law's continued relevance and applicability, and this pragmatic approach will surface at different points in the discussion. Third, a number of activities associated with conflict are not the subject of *ad hoc* treaty law provision. Customary law often has relevant rules, but their applicability to novel circumstances may be controversial, so whether new treaty law is required, or whether pragmatic adaptation of existing rules will cover the new circumstances is another recurring theme.

The law of armed conflict is more relevant today than ever and its principles and rules should be complied with universally and meticulously.[2] Improved compliance with the law is an international priority,[3] and it is clearly of vital importance that all involved in armed conflicts, states, armed groups and others take the required steps to improve compliance. However, the intended focus of this volume, as the title suggests, is on some particular developments in the way conflicts are prosecuted and on some specific issues concerning the law that regulates conflict. The following pages are therefore intended to give a sober, realistic assessment of the law as it applies to conflict today, of whether additional legal provision may be called for and of what alternative approaches may be appropriate if such additional law is not forthcoming.

Conflict in the twenty-first century is frequently complex and difficult to classify. Past certainties based on notions of war and peace, of armed conflict between states and within a state, seem to sit uncomfortably with some of the realities that we see around us. An armed group, for example, whose members communicate exclusively via the Internet and which lacks any evident command structure, may well not be 'organized' as that term is understood in law and yet such a dispersed, federated association of individuals may well be able to arrange military operations at a high level of intensity. Hostilities involving such a group, irrespective of their intensity, would not on current legal interpretations amount to an armed conflict.

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[1] For a discussion of the four overarching principles that govern the setting of limits on the conduct of warfare, namely humanity, military necessity, proportionality and distinction, see UK Manual 2004, Chap. 2 and Thürer 2011, pp. 64–94.

[2] Setting out national interpretations of the law in military manuals, training armed forces personnel and others in the law, maintaining discipline among the armed forces, ensuring timely investigation of breaches of the law and undertaking prosecutions and inflicting punishment in appropriate cases are among the critical national measures that contribute to achieving legal compliance.

[3] See 31st International Conference of the Red Cross and Red Crescent, 28 November–1 December 2011, Resolution 1, Strengthening legal protection for victims of armed conflicts, preamble and paras 2, 5, and 6. www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm; last visited 24 Oct. 2013.

Emerging technologies enable virtually associated groups to operate globally and thus challenge the geographical concepts on which critical legal notions are based. Operations that members of a virtually linked group may regard as involving a single conflict are classified by the law on a state-by-state basis. So it is logical to base the following discussion on the general idea of conflict, encompassing the full legal spectrum from criminal activities during peacetime to total war between states. Nevertheless, we should ask ourselves whether the spectrum of conflict that the current state of the law provides continues to make sense and we should consider whether adjustments might usefully be made.

Another critical element that has seen radical change in recent years is the law itself. Domestic law, as supplemented by human rights law, provides the legal norms against which state action to address situations falling short of armed conflict is judged. While that proposition is not controversial, less straightforward is the relationship between the law of armed conflict and human rights law, and controversies on that matter will be discussed fully in the pages that follow.

Treaty law relating to armed conflict seems to progress in 'fits and starts'. Periods of relative inactivity are followed by years when far-reaching advances are achieved. At the time of writing, 2013, development of the treaty law that regulates hostilities during armed conflict has largely stagnated for 36 years. Important methods of conducting hostilities in armed conflict remain unregulated by treaty law and the law relating to the protection of victims is essentially rooted in treaty arrangements made shortly after the end of World War II.[4] Moreover, the treaty law that applies to the most frequently occurring, and therefore arguably most important, class of armed conflict, namely non-international armed conflict, is significantly less comprehensive than that applying to the less frequently occurring form of armed conflict, namely that occurring between states.

These and other factors have, however, motivated the preparation of International Manuals on such diverse subjects as maritime warfare, air and missile warfare, the law relating to non-international armed conflict and the law of cyber warfare. The International Committee of the Red Cross has undertaken major and critically important projects to identify and state the customary legal rules that apply to armed conflict and to issue guidance on the interpretation of the challenging notion of direct participation in hostilities. *Ad hoc* tribunals have been established to deal with breaches of the law associated with particular armed conflicts in, for example, the Former Yugoslavia and Rwanda. Their jurisprudence and that of the International Court of Justice have had a considerable effect on development of the law, a trend that will be continued by the International Criminal Court, established in 1998. Add to these factors the writing of national military manuals, enhanced military training in the law, increased provision of legal advice during operations and a radical increase in the academic discourse and

[4] See Lietzau and Rutigliano 2010, p. 11, at pp. 10 and 11: "That current norms ill fit current circumstances should not surprise. Rarely has mankind accurately predicted tomorrow's challenge with yesterday's law."

it becomes evident that the law relating to conflict has developed markedly in recent decades. So while treaty law on the conduct of hostilities may have stagnated somewhat, developments in other aspects of the law have been impressive and should be recognized.

Technology, however, is yielding new tools of war and new environments in which conflict can be played out. Unmanned platforms, remotely controlled from very considerable distances, undertake ground attack operations on an increasingly routine basis. Automation technologies that are revolutionizing commercial production processes are having growing influence in the battlespace. New substances are being invented, for example through the medium of nanotechnology, and it is clear that genetic and other scientific research is liable to generate future advances that will have potential military applications. At some point, automation will give way to autonomy, and that is a process that seems destined to raise new and complex legal and ethical issues. Will the law be up to the job of protecting global society from the dangers that all of these potential developments may present?

People have always been regarded as the critical element in all warfare and yet some emerging technologies seem likely to have the effect of marginalizing people. Will all future conflict be changed by these developments and does a conflict between autonomously operating machines come within the recognized spectrum of conflict at all? Civilian involvement in future hostilities seems destined to increase. Budgetary constraints and the fact that much modern technological understanding is in civilian, indeed in young civilian hands attests to this trend. What status at law do these civilians have and what effect does their increasing involvement in the fight have on the core legal rules governing armed conflict?

Detention operations continue to be an essential element in the successful prosecution of military operations. Criminal mishandling of detainees has, however, attracted adverse publicity and brought shame on the military personnel, units and indeed on the nations involved. What legal rules regulate the handling of detainees and are there best practices adherence to which would help to preclude such unacceptable events?

The digital revolution is only a part of the rapid technological transformation of warfare that we have seen over the last couple of decades. Personal ‘smartphones’ enable private individuals to record and transmit events in real time. Internet connectivity enables such material to be transmitted globally and almost immediately. 24 hour news broadcasting brings events to the attention of the viewing public with lightning speed. Events associated with armed conflict can, moreover, be the subject of legal and political processes in ways not contemplated only a few decades ago. The combined effect of these trends is to shine a bright spotlight onto military operations in war.

Clearly, this book has been written at a time of extraordinary change in the related fields of conflict, of the law and of technology. Its simple purpose is to look at certain particular developments in each of these fields and to consider whether the legal arrangements are fit for purpose.

1.2 War, Technology and the New Media

The ways in which war is conducted and the associated technology that is employed are, however, continually changing. As Mike Schmitt accurately observes "[o]ccasionally, law anticipates future forms of warfare. More often, law emerges as a reaction to events that have occurred during armed conflict".[5]

Static, trench warfare of the sort seen in north-west Europe from 1914 to 1918 gave way to more mobile methods of combat in World War II and thereafter. War from the air, war employing rockets and missiles and war using munitions directed by modern guidance systems have enabled parties to a conflict to undertake attacks at enormous range and yet with ever increasing accuracy and reliability. Inter-continental ballistic missiles enter outer space as part of their trajectory and outer space itself has become a new and increasingly important environment in which war-related activity, such as information gathering and military communication using satellites, will increasingly be conducted. Even more recently, an entirely new, man-made environment has developed, namely cyberspace, the peacetime applications of which have transformed virtually all human activities from basic communication, through control of machinery and systems to doing the weekly grocery shopping and navigating in the family car. Commercial, financial, governmental, industrial, research, educational, medical, communications, public transport, infrastructure and security activities all usually involve heavy reliance on computer control systems and computer-based linkages, with the obvious consequence that computer dependence is liable to be the Achilles heel of modern societies in future armed conflict.

War is increasingly conducted in the glare of 24 hour news coverage. The so-called CNN effect has been apparent for a number of years. The potentially game-changing additional factor to emerge more recently is the advent of smartphone technology which, when combined with continuous news coverage, radically accelerates the information campaign cycle during armed conflict. If war is all about influencing the 'will' of the adverse party, and if the 'hearts and minds' of the opponent contribute directly to his 'will', it follows that factors that affect those hearts and those minds will be the focus of interest of the contesting military commanders. Some commanders might imagine that effects based operations that target, say, civilian facilities causing the population to doubt the acceptability of its own leadership's policies are the right way forward. Others might see the conduct of an effective information campaign as the best way of persuading those who need to be persuaded. How far commanders can go in pursuit of either type of goal is determined by international law, but how will that legal/practice interface develop as the technology continues to progress?

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[5] Protocol IV to the Conventional Weapons Convention, which prohibits the blinding laser weapons referred to in the Protocol, is cited as an example of law acting in an anticipatory way, and among the examples of international law inspired by past conflict, Geneva Convention IV is noted as a response to the victimization of occupied populations during World War II; Schmitt 2012, p. 455, 456.

1.3 People and the Law

If the law and the manner in which operations are conducted are variables in this increasingly complex pot pourri that we are constructing, so too is the way in which people use the law. There was a time when casualties and damage during war were greeted with grudging, distressed acceptance. They were seen as a normal, though highly regrettable fact of war. More recently, we see litigation taking place in a variety of fora, sometimes to gain independent clarity as to why a death occurred, sometimes to claim compensation for a perceived failure giving rise to death or loss, sometimes by or on behalf of persons who became casualties because of the targeting of a particular building or object and sometimes to assert that the human rights of members of the adverse party to the conflict were not being respected. So the information campaign has become multi-faceted, and maintaining popular support for the ongoing campaign requires parties to the conflict to strive to maintain a perception that military operations are being undertaken in strict compliance with the law.

1.4 The Legal Spectrum of Conflict

That very law, however, and its practical application are themselves becoming increasingly complex. Sharp, and deceptively simply expressed distinctions between international armed conflict, non-international armed conflict and situations that do not reach the armed conflict threshold are challenged by the practical realities of modern warfare in which the nature and classification of hostilities can change speedily both geographically and over time. These changes involve the application to a given situation of sometimes radically different legal rules. Action that, in the context of armed conflict, will see a member of the armed forces congratulated for having successfully targeted an elusive enemy commander may, if the intensity of operations diminishes to a particular degree or if the nature of the conflict otherwise changes, see the same actor charged with murder. Superimposed upon this series of challenges is the possibility that the legal spectrum of conflict itself may be evolving. *Ad hoc* provision in treaty law for wars of national liberation seems increasingly moribund. The legal utility of a continuing distinction between two classes of non-international armed conflict is, perhaps, worthy of debate. States do, however, seem determined to maintain the legal distinction between international and non-international armed conflict, concerned as they are by any suggestion or inference that rebels and traitors have any other status than that of criminals.

At the bottom end of this spectrum, however, is arguably the most numerous and possibly the most difficult element, namely conflict pure and simple, i.e. that which does not achieve the status of armed conflict and which is therefore regulated by the applicable domestic criminal law and by human rights law. While it

has long been accepted that conflicts characterized by riots, sporadic acts of violence, criminality, occasional acts of terrorism and the like do not amount to armed conflict, the emergence of loose networks of individuals without any identifiable command structure or organization but who nevertheless are able to use modern communication methods to achieve closely coordinated attacks challenges some conventional legal interpretations as to the dividing line between armed conflict and something that we will describe in this book as internal security situations. If that is not enough, the undertaking of relatively high intensity combat operations by groups whose motivation is entirely criminal also challenges traditional interpretations of what amounts to an armed conflict.

1.5 The Law of Armed Conflict and Human Rights Law

If the reality of the legal classification of armed conflicts is therefore anything but straight forward, one might at least hope that there would be clarity and simplicity as to the legal rules that apply to all activities within each class of conflict. Regrettably, this is not the case. Human rights law has achieved increased prominence in the decisions of international courts and in the literature. One could speculate as to the causes of such a development. Perceived gaps in treaty law relating to recent developments in the conduct of hostilities may be a factor. Controversies as to the extent and precise terms of customary law rules applying in armed conflict may also be relevant. Another consideration might be the difficulty confronted by individuals seeking redress under the law of armed conflict for breaches of that law that have caused them loss. This said, enforcement of the law of armed conflict by way of the prosecution of those found to be in breach is taken at least as, and quite possibly more, seriously now than in the past, although it is clear that too many serious breaches do not result in prosecution and punishment.

Be that as it may, decisions of the international courts have led authoritative commentators to conclude that human rights law applies at all times including during periods of armed conflict and that during such periods, the relationship between the law of armed conflict and human rights law is one of mutual complementarity. During periods of armed conflict, the *lex specialis* norms of the law of armed conflict will, it is said, apply to, or inform, specific human rights law rules in specific circumstances. It suffices for the purposes of this brief introduction to comment that the practical implementation of such an approach may be challenging in particular circumstances, so in the course of the following discussion we will explore some of those challenges and will consider possible solutions. The fact that there continue to be important controversies as to the content of the customary law of armed conflict and as to the relationship between the law of armed conflict and human rights law, constitutes a practical and important challenge for military commanders and for their legal advisers both of whom have to perform in this complex environment.

1.6 Internment Operations

Some at least of these issues have been played out, and litigated, in the context of what are referred to as detention or internment operations. While all right-thinking observers will condemn the mistreatment of those taken prisoner on the battlefield, or interned as civilians or who in any other circumstances find themselves in the hands of an enemy in times of armed conflict, the testing international law question of the moment is what body of law is to be applied to such internment operations. The interaction between human rights law and the law of armed conflict raises complex issues as to internment, particularly in relation to internment during non-international armed conflict and we will be exploring these issues as the discussion unfolds.

1.7 Autonomy, Cyber Deception and the Role of People in Hostilities

People have always been, and remain, central to the conduct of hostilities. They play a variety of roles including foot soldier, seaman, pilot of an attack aircraft, commander, planner, scientist, political leader, press spokesman, logistical support personnel, lawyer, intelligence source, target designator and civilian victim. Remotely piloted aircraft are already routinely used to undertake attacks, but evolving technology seems destined to enable machines to decide on attacks, including attacks from unmanned aircraft and cyber attacks, without the involvement of a human controller. Such a development raises obvious ethical concerns, but what does the law provide, and, just as relevant, will existing law determine the acceptability of such future methods of undertaking hostilities?

Cyber warfare seems likely to have an unusual quality of anonymity about it. Determining which computer was being used to undertake a cyber attack, who was operating that computer at the time, whether that person's act is attributable to a state, an organized armed group or some other identifiable entity, are all likely to be difficult matters that will take time to resolve. This anonymity, however, will enable parties to an armed conflict to mount extensive deception campaigns using cyber methods and with the explicit purpose of distorting the opponent's view of the battlespace. Deception as a technique in war is, of course, nothing new, so how will the existing legal distinctions between lawful and unlawful deception operations stand up to the challenges that cyber deception may be expected to pose?

As seasoned observers of the military scene are well aware, civilians are adopting ever more numerous roles associated with the conduct of military campaigns in armed conflict. Western States seem to be economizing by hiring less expensive civilian personnel in place of costlier military individuals to perform numerous support tasks. Technological developments of the sort we have already mentioned may also involve capabilities and tasks that, in peacetime, are

undertaken by civilians. The same financial challenges may preclude duplication of such capabilities by the military in anticipation of possible need in armed conflict. Whether each new civilian role constitutes direct participation in the hostilities such as to deprive the civilian of his or her protected status thus rendering them liable to attack and to prosecution for their hostile acts depends on how you interpret the notion of taking a direct part in hostilities. As is well known, there are differing views as to the meaning of the term. This uncertainty as to what constitutes direct participation seems likely to become more relevant as technology and financial stringency bring civilians closer to the fight.

1.8 Application of Existing Law to New Situations

An issue that is a recurring theme throughout this book is the extent to which existing legal norms can properly be applied to the new technologies, the new methods and means of warfare and the new strategic circumstances that we are about to discuss. That issue breaks down into two distinct but closely related questions, namely whether a particular rule or norm applies in the novel context and, if so, how it applies. These are the core questions with which the authors of recent relevant International Manuals, such as the Tallinn Manual, have grappled.

Marco Sassoli correctly observes that determining the *lex lata* applicable to a given question involves interpretation of the existing rules, that treaty rules cover not only the situations envisaged when they were drafted but "all situations falling under their wording understood according to their purpose and object, and that customary rules cover future cases which always differ in some respect from the cases that created the customary rules".[6] This approach is adopted throughout the book to seek to determine to what extent the traditional rules can properly be applied to the new circumstances that are being discussed. The core principles and important legal rules have an inherent flexibility that usually renders them capable of practical application to new means, methods and circumstances of conflict so the adoption of the pragmatic approach to the matters referred to earlier in this chapter is, in the author's view, likely to produce the most satisfactory outcomes that can realistically be achieved in what are sometimes difficult circumstances.[7]

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[6] Sassoli 2011, p. 34 at p. 48.

[7] Marco Sassoli complains that those who assert such inadequacy rarely produce concrete proposals and that it is not always clear whether it is contended that the rules simply do not apply, or that they apply but are inadequate. For an interesting analogy relating to Marco Sassoli's cat, see Sassoli 2011, pp. 49–50. There is undoubted force in the argument that the over-classification of certain situations, such as the so-called 'war on terror', as an armed conflict may deprive certain victims of better protection under the law of peace, may cause the applied body of law to appear inadequate, may cause the state to apply some of the provisions of the body of law while declining to apply some of its other provisions and that this pick and choose approach may erode wider willingness to comply with the law where it indisputably applies; Sassoli 2011, p. 52.

1.9 Treaty Law Gaps and International Manuals

As we have already noted, the treaty law on the conduct of hostilities was last revised in 1977. Some particular technologies and methods of warfare are not specifically referred to in the treaties, and groups of experts have been convened to prepare international manuals in which specific topics relating to armed conflict are considered and in which established legal principles and rules are adapted to take account of the peculiarities of the technology or method of warfare with which the manual is concerned. The product of such work, undertaken by groups of experts typically working in their private capacity, does not constitute a source of law, and would seem to the present author to sit fairly and squarely within Article 38(1)(d) of the Statute of the International Court of Justice as a "subsidiary means for the determination of rules of law". Does such work by experts obviate the need for States to keep the law up to date, or should the International Manuals serve as a 'wake up call' to States, pointing the way to areas of the law where new provision is required and indicating, not directly, the sort of form such new provision should take and the legal context into which it should fit?

The obvious result of the dynamic discussed in the first paragraph of this chapter is that at any particular moment applicable law may not necessarily be perfectly suited to address the specific context in which it is to operate. Indeed, as the reader will discover on venturing into the chapters of this book, the author rather feels that there are some inadequacies in the current legal arrangements that regulate the conduct of armed conflict and that these are attributable to the inactivity of states. This is of course a vitally important matter. The conduct of all forms of conflict, including armed conflict, and the maintenance of state security in the face of hostile activity falling short of armed conflict are profoundly dangerous activities. The law that regulates such events needs to be clear, straight-forward and comprehensive, it needs to be clearly understood by those who are to operate it and it needs to be accepted by all or the vast majority of those involved in conflict. Only then do we have a reasonable prospect of broad compliance with the law.

It is therefore important, in the author's view, to clarify how the body of treaty and customary law that we have applies in the novel circumstances discussed in this book. Where there are gaps in legal provision, and where there is lack of clarity in the law, it is important that appropriate action is taken to clarify the law. In this regard it should be recalled that the law of armed conflict is the body of law that is designed to balance two fundamentally opposed considerations, military necessity and humanitarian concern. This conundrum that lies at its core also underpins its unique relevance to the matters it regulates. While in this litigious era, adjustments are undoubtedly required to facilitate claims by individuals, any one perceived inadequacy should not be allowed to mask the greater value that is the complex balancing task fulfilled by a body of law developed, so often, in response to egregious events in past conflicts. The law is not broken; it just requires some periodic maintenance, and some of that maintenance is a little overdue.

Importantly, however, the world would undoubtedly be a far better place if the law that we have were to be adhered to more closely in future conflicts than has been the case in the past.

1.10 Everything Will Not Change

The title of the book refers to conflict rather than armed conflict. This is deliberate. Where it is relevant to do so, the discussion will cover all conflict, including that which falls below the armed conflict thresholds. Indeed, emerging complexity in the classification of conflict and the ease with which situations of internal tension and disturbance can develop into armed conflict and vice versa mean that it would be illogical to exclude internal security situations from a discussion of this type. We should, however, not imagine that future conflict will consist exclusively of the evolving methods, technologies and trends discussed in this book. War in the forms we have seen played out all too frequently in past decades will likely continue, and any emerging legal norms will have to be so expressed as to encompass that reality.[8]

Recent decades have seen far-reaching development in the enforcement of the law against individuals. *Ad hoc* tribunals were established to deal with criminal conduct associated with the hostilities in the former Yugoslavia, in Rwanda and in Sierra Leone, and in 1998 a Statute was adopted in Rome establishing an International Criminal Court to try offences of genocide, crimes against humanity and war crimes if states having jurisdiction in the particular case are either unable or unwilling properly to investigate and prosecute a case. So, from a situation in which breaches of the law of armed conflict usually went unpunished, new arrangements have emerged which seem destined to result in a more widespread belief that the law of armed conflict is to be obeyed, and that failure to do so will have important adverse consequences.

1.11 Purpose of the Book

This book has been written with the explicit purpose of expressing the author's personal views on particular matters that he regards as being of greatest moment in that part of international law that deals with conflict. In order to keep the text reasonably brief, only certain selected issues have been chosen for discussion. A chapter is devoted to each issue, or group of issues, and the matters of difficulty or controversy are explained in terms that are as simple and clear as the underlying

[8] Future conflict seems likely to be a development of the forms of modern conflict with which we are familiar, namely involving transnational, state, group and individual participants, operating at global and local levels, involving adversaries who present hybrid threats and combining conventional, irregular and asymmetric threats in the same time and space; DCDC 2010, Chap. 5.

legal complexities will allow. The author recognizes that other observers may consider other issues to be of greater importance, or may interpret the issues discussed in the book differently or may apply other intellectual disciplines to the task. The author hopes, however, that by expressing his own appreciations as clearly and succinctly as he can, the reader is assisted to form his or her own view, whether in agreement or otherwise.

Nevertheless, the book has been written at a time when the law of armed conflict is facing significant challenges. The author's view is that states should address these challenges without unnecessary delay. By drawing attention to some of the important legal issues the author hopes that, along with other contributions to the literature, this book will help policymakers to determine whether action is required and, if so, what form it should take.

1.12 The Structure of the Book

In Chap. 2, we reflect on how the currently understood legal spectrum of conflict has evolved from the rather more limited notions of war and peace as applied in the nineteenth and first half of the twentieth centuries. We break the spectrum down into its constituent elements, and consider which elements seem likely to endure and which seem to be increasingly moribund. We then focus more specifically on the differences in legal provision as between international and non-international armed conflicts, between the different classes of non-international armed conflict and between armed conflict and criminal conduct. Having explored these points of evident distinction, we try to draw some conclusions as to a possible emerging legal spectrum of conflict.

In Chap. 3, the question whether it is states or experts who are developing international law is thrown into sharp relief when we consider the increasing importance of International Manuals. While a chapter on this topic might sensibly appear towards the end of the book, it has been decided to locate it early in the text in order to clarify the status in law of the relevant documents before then referring to them frequently in the ensuing chapters. We start the analysis by looking at some apparent gaps in the treaty law applicable to armed conflict and note briefly how those gaps have come about. We then assess the status in law that some significant documents claim and appear to have, addressing in turn the 1994 San Remo Manual on International Law Applicable in Armed Conflicts at Sea, the 2005 ICRC Customary International Humanitarian Law Study, the 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities, the 2010 HPCR Manual on International Law Applicable to Air and Missile Warfare, and the 2013 Tallinn Manual on the Law of Cyber Warfare. The author acknowledges that the ICRC Customary Law study and the ICRC Interpretive Guidance are not presented as manuals and that they have a standing that would, in a sense, set them apart from the International Manuals. However, all of the listed documents would

seem to the author to have a similar legal status and they are therefore included in the discussion on that basis.

On any reckoning, the listed documents represent a very considerable scholastic effort involving a great number of eminent experts. The vital questions, addressed in the chapter, are whether they constitute a new phenomenon, the status in law that should be accorded to these writings, whether they should influence the development of 'hard' law and whether they are based on existing law or seek to make new law.

In Chap. 4, the focus shifts to the employment of new technologies in warfare. The application of existing law to remotely-piloted and autonomous unmanned platforms that undertake attacks and to cyber warfare is discussed. In a dedicated section, we reflect on how certain types of cyber operation that employ or target unmanned platforms may generate some novel legal concerns. In particular, we evaluate cyber deception operations by reference to the legal distinction between unlawful perfidy and lawful ruses. The chapter then introduces the notion of 'artificial learning intelligence' and discusses what effect it may be expected to have on the legal issues already raised by reference to unmanned attack and cyber warfare.

In Chap. 5, we turn to the law of weaponry and start by identifying its principles and rules, explaining how they translate into criteria against which the lawfulness of new weapons should be judged. We note the requirement placed on all states legally to review all new weapons and apply the relevant criteria to four emerging weapons technologies or methods of warfare. We close the chapter by considering the differences in the application of weapons law as between different classes of conflict.

Chapter 6 begins by looking at some of the likely causes of future conflicts and develops the discussion into an assessment of the character of future armed conflicts. Taking that assessment into account, we then assess some particular approaches to the conduct of armed conflict. The first of these approaches is remote attack, by which is meant attacking from a distance such as to minimize the risk for attacking forces. We review not only the relevant legal obligations but also the liability issues that can arise when erroneous remote attack operations occur. Ethical issues can also arise as a result of the apparent, perhaps real, invulnerability of attackers that use such methods, and these are factored into the discussion. Perhaps even greater ethical concerns arise from some notions of effects based warfare, and we therefore consider what implications these have for the core international law principle of distinction. To the extent that evolving approaches to warfare involve removing human beings from the battle, we ask whether the result is war in any recognizable sense. Finally, we examine asymmetry in warfare and the legal implications of differing responses to such a situation. The common theme unifying each of these phenomena is their capacity to challenge traditional understanding of the law, a theme that the chapter explores.

In Chap. 7, we concentrate on people. We identify the various users of violence in modern conflicts including armed forces and combatants, civilians who directly participate in hostilities, people who are involved in non-international armed

conflicts and those who use force in conflicts below the armed conflict threshold. The focus then shifts to the classes of person whom the law seeks to protect, including civilians, people benefitting from specific protection under the law of armed conflict and persons who are protected under domestic and human rights law. The chapter closes with an evaluation of the impact on people of the various trends and developments that have been discussed in other chapters.

Detention operations, or internment as we shall also refer to it in this book, have generated a deal of controversy of late. Chapter 8 sets about the difficult task of describing the law that applies to such operations throughout the legal spectrum of conflict. We trace the origins and current state of the law as it applies to prisoners of war and civilian internees in international armed conflicts. Thereafter, we discuss the vitally important fundamental guarantees provided for in Article 75 of API. At this point, we seek to disentangle the considerable legal ambiguities associated with internment operations in non-international armed conflict. Human rights law is then considered as it applies, respectively, to international and non-international armed conflicts, to the transfer of internees and to internee operations in internal security situations. The chapter closes with an assessment of how the trends and developments in future warfare that we have identified may be expected to affect future internment operations.

Chapters 9 and 10 address what is, arguably, the most difficult and important issue in the law of armed conflict today, namely the relationship between it and human rights law. Acknowledging that human rights law applies throughout periods of conflict, including armed conflict, we begin Chap. 9 with an assessment of how it applies during internal security situations and, thereafter, its application in armed conflict. We review the decisions of the International Court of Justice and of the European Court of Human Rights that bear most directly on the issue. Noting the implications of these decisions as explained by eminent commentators, we seek to work out whether human rights law can sensibly be applied to certain particular armed conflict-related activities and, thereafter, the significance of particular rights for the efficient conduct of an armed conflict. Although the discussion is mainly based on the European Convention, we briefly review certain other human rights treaty arrangements in order to achieve a broader appreciation as to whether the overall relationship between the two bodies of law is satisfactory. After summarizing the basic principles that emerge from this discussion, Chap. 10 proposes a methodology for determining the activities in armed conflict that should, respectively, be regulated by the law of armed conflict, by human rights law or by both.

In Chap. 11, the dramatic changes that have taken place in media and communications are factored into the discussion. Against the background of the legal distinction between war correspondents and journalists on dangerous missions, the chapter considers the radically increased diversity of modern media and the human rights implications of some media operations, such as attempts to limit information flows in the digital age. The capacity for media activities and legal processes to throw a spotlight onto action taken during periods of tension and armed conflict is a vitally important feature of modern warfare.

In Chap. 12, we draw together the threads from the preceding chapters, reflecting on the centrality of the principle of distinction, on attempts to fill gaps in the law of armed conflict using human rights law, on the action that states should consider to address apparent gaps in the law of armed conflict and on the important matter of enforcement of the law. Somewhat more philosophically, we ask whether the purpose of warfare is changing, noting the challenges that future types of conflict pose for their classification under the established legal spectrum. The chapter ends with some conclusions that might be drawn from the analysis as a whole.

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Chapter 2
The Changing Legal Spectrum of Conflict

Contents

2.1 Introduction

The law that applies to any situation in life depends on what the situation comprises. So stated, this may appear to be something of an obvious truism. However, it suggests why the legal spectrum of conflict is such a critical topic to any discussion of the law relating to conflict, namely because "[t]he relevant bodies of law—in particular, international humanitarian law, international human rights law and domestic law—differ according to the classification of the situation".[1] Oppenheim devoted the second volume of his seminal treatise to, *inter alia*, war,[2] so we should start this discussion by considering what he meant by that notion.

[1] Wilmshurst 2012, p. 2.
[2] Oppenheim 1926.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_2,

Oppenheim described war as "the contention between two or more States, through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases". As he pointed out, "war is a fact recognised, and with regard to many points regulated, but not established by International Law".[3] The term 'contention' meant that there had to be a violent struggle through the application of armed force. To constitute a war, "two or more States must actually have their armed forces fighting against each other, although its commencement may date back to a declaration of war or some other unilateral initiative act". Moreover,

> [u]nilateral acts of force performed by one State against another without a previous declaration of war may be a cause of the outbreak of war, but are not war in themselves, so long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers them to be acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisal, or during a pacific blockade in the case of an intervention, are not necessarily acts initiating war. And even acts of war illegally performed by one State against another—for instance occupation of a part of its territory—are not acts of war so long as they are not met by acts of force from the other side, or at least by a declaration that it considers them to be acts of war.[4]

The reader may wonder whether there continue to be two mutually exclusive states of affairs, war and peace, with all political circumstances coming within one or the other category. After all, school students studying history will continue to learn the dates of past wars, with the associated inference that at all times outside those dates, peace prevailed.[5]

If those two mutually exclusive situations provided a satisfactory basis for Oppenheim's writings,[6] we have more recently seen the emergence of a more complex spectrum, ranging from what one might loosely describe as peace at one end of the scale to full-scale multi-state warfare in which the vital strategic

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[3] Oppenheim 1926, p. 115. For a more recent discussion of the concept of war, see Kritsiotis 2007, pp. 31–45.

[4] Oppenheim 1926, p. 116. In a footnote to this part of his text, Oppenheim cites Louis XIV's seizure in 1680 and 1681 of the then Free Town of Strasbourg and other parts of the German Empire without meeting armed resistance. "These acts of force, although doubtless illegal, were not acts of war."

[5] Recall the citation by Hugo Grotius of Cicero to the effect that "*inter bellum ac pacis nihil est medium*", or, loosely translated, there is nothing in between war and peace; Grotius 1625, Book III, Chapter XX1, para 1 and consider Garraway 2012, p. 93.

[6] To be fair, Oppenheim did recognize the existence of civil wars when "two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government". However, having recognized such states of affairs, Oppenheim took the view that "[a]s armed conflict is a contention between *States*, such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term"; Oppenheim 1926, p. 124 and see Green 2008, pp. 66–67. It would, Oppenheim pointed out, become war if belligerency of the insurgents were to be recognized. Colombia's action in accordance with the ruling of the Constitutional Court of 1995 seems to have been an example of recognition of belligerency; Mikos-Skuza 2012, p. 19.

interests of a State, perhaps its very existence, are critically at stake at the other, but with a selection of differing natures and intensities of hostile operations in between. The purpose of this chapter is to consider how the currently applicable law defines the spectrum of conflict, to assess how those legal arrangements fit with the reality of modern conflicts and to consider how the spectrum of conflict might usefully develop in coming years.

If, however, we are sensibly to discuss possible future adjustments in the spectrum of conflict, we must start by trying to demonstrate that the spectrum is in fact susceptible to change. Without doubt, it is not a static phenomenon. Oppenheim wrote about war whereas, as we shall see, since 1949 the existence or otherwise of an 'armed conflict' has become the critical factor.

In the past, a formal declaration of war, or an ultimatum, was required in order to bring about a state of war, which in turn brought into effect such legal arrangements as then existed.[7] Thus, Hague Convention III required that there should be no hostilities "without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war".[8]

So, as we can see, during the period before 1949, the international law focus was on the existence or otherwise of a state of war, a state of affairs that could only arise between two or more States.[9] As the next section will make clear, it was the early articles of the 1949 Geneva Conventions that introduced the notion of 'armed conflict' into the law,[10] and that made the first international law provision in respect of armed conflicts that are not, or that have not by virtue of belligerency

[7] For a discussion of the notion of war, see Greenwood 1983, pp. 133–147, and for the decreasing incidence of war declarations, see Greenwood 2008, pp. 49–50 and Kleffner 2013, p. 47.

[8] Hague Convention III, 1907, Article 1. The UK Manual 2004, p. 28, note 2, observes that when Germany attacked Poland in 1939, she declared war simultaneously. Arguably, the declaration made by Great Britain in September 1939 was an example of the latter, conditional, declaration.

[9] Consider for example Hague Declaration IV, 2 Concerning Asphyxiating Gases, The Hague, 29 July 1899, which stipulated "[t]he present Declaration is only binding on the contracting Powers in the case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power". Note that Leslie Green puts the relationship the other way around by observing that historically, international law is concerned only with relations between states with the result that the law of armed conflict developed in relation to inter-state conflicts and was not in any way concerned with conflicts occurring within the territory of a state or between an imperial power and a colonial territory; Green 2008, p. 66. As Frits Kalshoven and Liesbeth Zegveld observe, the contracting parties to the 1949 Conventions would not necessarily have regarded the rules they were establishing or recognizing as being unsuitable to a situation such as the American Civil War. "Rather, the idea that treaty rules could be laid down for such an internal situation simply had not yet entered their minds"; Kalshoven and Zegveld 2011, p. 30.

[10] It is the fact that a state of armed conflict is in existence that is the vital issue since 1949; Akande 2012, p. 40 although "the qualification of a situation as an armed conflict in practice remains dependent on the parties' perceived interests in applying their treaty obligations"; Kalshoven and Zegveld 2011, p. 31.

recognition been rendered, international in nature. For the purposes of this section, the important point is that rather significant changes in the legal spectrum of conflict took place in 1949 and, as we again shall see in the next section, a further change occurred in 1977.

It is therefore reasonable to ask whether the time is now ripe for a further adjustment in the legal spectrum in order to more accurately reflect the current experience.

2.2 The Legal Spectrum of Conflict in Current Law

Any observer of the conflicts that break out from time to time around the globe will readily accept that they do not all consist of total inter-state war of the sort referred to in the previous section. By the same token, such conflicts cannot properly be regarded as 'peace'. A state of peace, on the other hand, is consistent with occasional criminal activity, which may well include violent acts involving the use of firearms by criminals and addressed sometimes also by violent activity by the police and security forces of the state in response. But situations do arise from time to time which do not easily fit into either of those categories, and this section will describe how international law, domestic law and human rights law currently divide these situations into categories to each of which they apply discrete legal arrangements.

2.2.1 International Armed Conflict

We shall start our legal spectrum of conflict with what used to be known as a state of war between states but which is now generally referred to as international armed conflict. This occurs when a state is involved in an armed conflict against another state. So instead of considering whether a state of war exists, the focus is now on whether the hostilities between the respective states amount to an armed conflict. This is because Article 2 common to the four Geneva Conventions of 1949 provides that those conventions apply to: "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them".[11]

Accordingly, if war is declared a state of armed conflict will exist, Common Article 2 to the Geneva Conventions will apply and thus the provisions of the Conventions and of API must be applied whether or not actual hostilities have

[11] Article 2(1) common to the Geneva Conventions 1949. As to common Article 2 conflicts generally, see Solis 2011, pp. 150–152 and as to the transformation of a conflict from a common Article 3 conflict (discussed below) to a common Article 2 conflict and vice versa, see Solis 2011, pp. 154–155.

commenced.[12] The reference to 'even if a state of war is not recognized by one of them' makes the point that the body of law will apply on the basis of the factual situation that exists irrespective of whether either state involved in the hostilities decides to recognize that what is going on constitutes an armed conflict.[13] Diplomatic or political statements as to the situation and the involvement of armed forces may be informative but are not determinative of the issue.[14] Once events reach the armed conflict threshold, the obligations and rights of combatants, civilians and of all those affected by the hostilities will be determined by the law of armed conflict.

As Wolff Heintschel von Heinegg has commented, if a state pretends that an armed conflict is not in existence when manifestly it is, this may result in unnecessary and potentially damaging confusion in the armed forces, for example because uses of force that are permitted under the law of armed conflict may well be prohibited if no armed conflict is under way. It is therefore important that states correctly characterize situations to which they deploy their armed forces so that all involved fully and accurately understand the legal context in which they are to operate.[15] There must also, however, be an *animus belligerendi*,[16] which, as Francoise Hampson notes, suggests it is possible to have an alternative *animus*, for example extraterritorial law enforcement against persons engaging in criminal activity against the acting state and against whom the state where they are located is unable or unwilling to act.[17]

In the Geneva Convention Commentaries Jean Pictet opines: "any difference arising between States and leading to the intervention of members of the armed

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[12] Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API); Greenwood 2008, p. 47.

[13] It is now generally accepted that the final phrase in common Article 2 should be interpreted as meaning 'even if the state of war is not recognized by one or both of them'; Greenwood 2008, p. 47.

[14] An international armed conflict can be initiated by a declaration of war, by the declaration of an aerial or naval blockade and the law of international armed conflict will apply in any case of belligerent occupation; Tallinn Manual, commentary accompanying Rule 22, para 17. Note Elizabeth Wilmshurst's observation that "[t] he recognition of the National Transitional Council as the government of Libya by some member States of the coalition did not, it is submitted, alter the classification of the conflict between those States and Gaddafi's forces. In other words it is the facts rather than a subjective act of recognition alone which determines the category of armed violence"; Wilmshurst 2012, p. 483.

[15] Heintschel von Heinegg 2011, pp. 5–7. Note the view of Mary Ellen O'Connell and Ania Kritvus that the available evidence tends to suggest that IHL is triggered for UN peacekeeping operations in the same situations as for states, and that the key factor is the intensity of the fighting; O'Connell and Kritvus 2012, p. 118.

[16] Dinstein 2005, pp. 14–15.

[17] Hampson 2008, pp. 553–554, citing as examples of such situations the Predator strike in Yemen if conducted without territorial state consent and Colombian army use of force against FARC personnel in Ecuador. Consider in this regard the Fisheries cases which were not treated as international armed conflicts although armed force was used; see Asada 2012, p. 51 at pp. 62–63.

forces is an armed conflict".[18] The Commentary goes on to point out that "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place".[19]

Christopher Greenwood refers to the case of the US pilot shot down and captured by Syrian forces over Lebanon in the 1980s, noting that the US maintained that the incident constituted an armed conflict entitling the captured pilot to prisoner of war treatment under Geneva Convention III. He comments, however, that it is not clear that States will always take such a broad view; "[i]t may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply".[20] However the ICRC takes the view that there should continue to be no intensity threshold for hostilities to constitute an international armed conflict because that helps to avoid political and legal controversies as to whether the threshold has been reached and because of protection considerations.[21] Moreover, the API Commentary asserts that humanitarian law applies to "any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it."[22]

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[18] Pictet 1960, p. 23. As the AMW Manual puts it at para 1 on p. 39, what counts is that two or more States are engaged in hostilities with each other.

[19] See for example, Pictet 1952, p. 32, but for the competing view that greater extent, duration, or intensity of hostilities is required to establish the existence of an international armed conflict, see Tallinn Manual, commentary accompanying Rule 22, para 12. The International Law Association, Use of Force Committee, in its Final Report on the Meaning of Armed Conflict in International Law (2010), 10–18, contends that a certain intensity of hostilities is required to constitute an international armed conflict. See criticism of this view in Corn et al. 2012, pp. 75–77.

[20] Greenwood 2008, p. 48 citing 82 Proceedings of the American Society of International Law (1988), pp. 602–603 and 609–611.

[21] ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 7.

[22] Sandoz et al. 1987, para 62. Experienced commentators have observed that a number of conflicts between states have involved a denial by at least one state that a dispute such as would bring the conflict within Common Article 2 existed between them. The better view, however, is that 'hostilities without dispute' theories conflict with the plain meaning and widely understood interpretation of Common Article 2; Corn et al. 2012, pp. 83–84, discussing, *inter alia*, the 2006 Israeli Intervention in Lebanon and the 1989 US intervention in Panama. For other examples of incidents involving the use of armed forces in a state on state context but not treated as an armed conflict, see O'Connell et al. 2012, pp. 287 and 290. Note that the institution of a blockade constitutes a recognition of the belligerency of the blockaded party and thus internationalizes what may hitherto have been a non-international armed conflict; Scobbie 2012a, pp. 302–303. Wolff Heintschel von Heinegg draws attention to the blockade during the American Civil War as an important example, and discusses events during the Spanish Civil War, in Algeria, Sri Lanka, Gaza and Libya; Heintschel von Heinegg 2012, pp. 214–216. Yoram Dinstein points out, however, that recognition of belligerency will not change the character of the non-international armed conflict into an international one—rather, it has the effects that the law of neutrality will

Whether a particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances. Replacing border police with members of the armed forces and accidental cross-border incursions by armed forces personnel would not in themselves rise to that level, "nor would the accidental bombing of another country".[23] An invasion of another country would, of course be an armed conflict.[24] Once the threshold is reached, the legal duties the law imposes must be complied with.

While the requirement for the involvement of two or more states in the armed conflict is clear,[25] more complex is the position where individuals or groups that are not an organ of a state are fighting against the government of a state while deriving a degree of support from another state. Armed conflicts that began as non-

(Footnote 22 continued)
apply to the conflict and that captured non-State organized armed group fighters will have prisoner of war status; Dinstein 2012, pp. 408–409. As to the demise of the doctrine of belligerency as a mechanism for applying the law of war in a non-international armed conflict, see Corn et al. 2012, pp. 68–69 and Sivakumaran 2012, pp. 195–196.

[23] UK Manual 2004, para 3.3.1.

[24] For example, Mike Schmitt is clear, and he must be right, that the 2011 military action pursuant to UNSCR 1973 to enforce a no-fly zone over Libya was subject to the law of armed conflict. The military action "contemplates the use of military force by one state against another and therefore the law of armed conflict governs any military measures taken…"; Schmitt 2011, p. 50.

[25] Consider, however, the view of the UN Commission of Inquiry into the Conflict in Lebanon in 2006 that the fact that the Lebanese Armed Forces took no active part in the hostilities that primarily involved the Israeli Defence Force and Hezbollah did not deny the character of that conflict as "a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it"; Human Rights Council 2006, paras 50–62. Iain Scobbie, however, having discussed and rejected Geoff Corn's notion of transnational conflict as applying to Lebanon 2006, comes, after a careful analysis, to the conclusion that Lebanon 2006 should be seen as a cross-border non-international armed conflict; Scobbie 2012b, pp. 400–410. David Graham, however, sees in the ignoring in Hamdan of the traditional view that Common Article 3 conflicts are internal to a single state the birth of the, as he contends, misguided notion of transnational non-international armed conflicts; Graham 2012, p. 51. For Geoff Corn's view that the dichotomy between international and internal armed conflicts was always under-inclusive because it failed to account for the possibility of extra-territorial armed conflicts between a State and non-State belligerents, and his view that the notion of transnational armed conflict evolved to respond to the gap, see Corn 2012, pp. 61–62. The US view seems, however, to be that it is involved in a non-international armed conflict with Al-Qaeda the transnational activities of which pre-suppose a transnational armed conflict that is internal to each country where it occurs; see for example Brennan 2011 available at www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an. Sandesh Sivakumaran concurs that, to the extent that it is an armed conflict at all, the US armed conflict with Al-Qaeda is of a non-international character, being fought between a state and a non-state armed group across international borders. "The cross-border element is, then, of a different degree of geographical proximity to the typical cross-border non-international armed conflict but it is not of a different type as to necessitate it being treated in an altogether different manner"; Sivakumaran 2012, p. 234. India has not used military force against Pakistan which it believes bears some responsibility for acts of terrorism, employing instead law enforcement and diplomacy. Egypt, Kenya, Tanzania, Spain, Indonesia and Germany have adopted a similar approach; O'Connell 2012, p. 7.

international in character may be internationalized should a state intervene in support of the insurgents or rebels either by undertaking military operations itself in support of the rebels or by exercising control of the actions of the rebels. The precise nature of the control that will internationalize an armed conflict in this way has been the subject of differing interpretations, respectively, in judgments of the International Court of Justice and of the International Criminal Tribunal for the Former Yugoslavia. In the Nicaragua Case, the International Court of Justice identified the need for effective control.[26] Such effective control would arise where there is a relationship of dependence and control. As the ICJ explained in the Genocide case,

> persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[27]

This complete dependence may not of course exist. If that is the case, under the ICJ jurisprudence specific acts of the persons, group or entity can be attributed to the state if they are carried out on its instructions or under its direction or effective control. It must be shown that this 'effective control' was actually exercised or that the state's instructions were given in respect of operations in which the alleged violations occurred. General instructions in respect of the overall actions taken by the persons or groups of persons that committed the violations would not usually suffice.[28]

In the Appeals Chamber Judgment in the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided that,

> [i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should

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[26] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America, Merits*, Judgment of 27 June 1986, in ICJ Reports (1986) p. 14 at para 115.

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montene*gro) ICJ Rep 2007 (*Genocide* Case) at para 392. Note the different criterion of 'overall control' adopted by the ICTY in *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Judgment of the Appeals Chamber, 15 July 1999, referred to below, and see AMW Manual, para 4 and footnotes 69 and 70 at p. 40. If the group etc. is not characterized in domestic law as a state organ, it would be exceptional to so characterize it for the present purposes; Genocide Case, para 393.

[28] Genocide Case, paras 396–406. For an explanation of the distinction in approach between the ICJ and the ICTY, see Akande 2012, pp. 59–60 and Schmitt 2012a, p. 461.

also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law.[29]

The relevant support must, however, go beyond financial assistance, military training or provision of military equipment. The degree of control that is required varies. Where the question at issue is whether a single private individual or a group that is not militarily organized has acted as a de facto state organ when performing a specific act, it is necessary to ascertain whether specific instructions as to the performance of that particular act were issued by the state to the individual or group, or whether the unlawful act was publicly endorsed or approved by the state after the event. By contrast, control by a state over subordinate armed forces or militias or paramilitary units may be of an overall character and must comprise more than the mere provision of financial assistance or military equipment or training.[30] In the latter case, the issuing by the state of specific orders or direction by it of individual operations are not required; the necessary control exists if the state, or party to the conflict, has a role in organizing, coordinating or planning the military actions of the military group in addition to financing, training, equipping or giving operational support to the group.[31]

While not taking a formal position on the matter, the ICJ has acknowledged that, in so far as it is employed to determine whether an armed conflict is international in character, "it may well be that the [overall control] test is applicable and suitable".[32]

It should be noted that an armed conflict that is 'internationalized' by virtue of the intervention of another state to assist the rebels may, arguably, become a non-international armed conflict if the rebels take over the bulk of the territory of the state in conflict and if the rebels form a suitably independent government with such consent from the population as to transform the nature of the conflict.[33]

To be 'armed' in nature, a conflict must include the conduct of hostilities.[34] If an international armed conflict exists, the Geneva Conventions of 1949, the 1899 and 1907 Conventions and Declarations of The Hague, the 1925 Geneva Gas Protocol and, for states party thereto, the 1976 UN Environmental Modification Convention, API[35] and other relevant subsequent treaties will apply to the inter-state hostilities and to the status of participants.[36]

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[29] *Prosecutor v. Tadić,* Appeal Chamber Judgment, paras 131, 145 and 162. See also the ICC case of *Prosecutor v. Thomas Lubanga Dyilo*, case number ICC-01/04-01/06 dated 14 March 2012, para 541.

[30] *Tadić*, Appeal Chamber Judgment, para 137.

[31] *Tadić*, Appeal Chamber Judgment, para 137.

[32] *ICJ Genocide Case* Judgment, para 404.

[33] See the discussion at Akande 2012, pp. 62–63.

[34] Tallinn Manual 2013, commentary accompanying Rule 22, para 11.

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (API).

[36] In addition, the customary law of international armed conflict will apply. API supplements the Conventions of 1949 and applies "in the situations referred to in Article 2 common to those Conventions"; API, Article 1(3).

In international armed conflicts, the domestic law of the territory where the conflict is taking place will continue to apply, but when acting in accordance with the law of armed conflict in furtherance of the hostilities, a member of the armed forces will not breach that domestic law.[37] He or she will enjoy combatant immunity for those lawful hostile acts.

2.2.2 *Conflicts Under Article 1(4) of API*

Article 1(4) of API makes specific provision for a very particular class of armed conflict which it defines as conflicts:

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

Such conflicts will, as a rule, be conducted within the national confines of a single state and in a strict sense are not international in character. Indeed, in 1949 they "were considered non-international armed conflicts and subject to Common Article 3 alone".[38] They are, however, regulated under API for states that are party to that treaty because the situations provided for in Article 2 common to the Geneva Conventions, namely international armed conflicts discussed in the previous section, include Article 1(4) conflicts. So these Article 1(4) conflicts, or 'conflicts of national liberation' as we shall refer to them, are classified as international armed conflicts for the purposes of API and for the purposes of the 1949 Conventions for states party to API.[39]

To come within Article 1(4), the relevant 'people' must be fighting against colonial domination, alien occupation or a racist regime. If their opponent cannot objectively be placed in any of these categories, the provision will not apply. They must also be pursuing the conflict in the exercise of a right to self-determination that they have.[40] As Frits Kalshoven and Liesbeth Zegveld point out, "the State concerned must be a party to the Protocol and the authority representing the people must undertake to apply the Conventions and the Protocol by means of a declaration addressed to the Depositary".[41]

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[37] Hague Regulations 1907, Article 1 and API, Article 43(2).

[38] Sivakumaran 2012, p. 213.

[39] As Andreas Zimmermann points out, however, certain states such as Israel are persistent objectors to this provision and the question arises what effect that may have on soldiers of such states facing criminal liability for acts that only constitute offences when committed in the context of an international armed conflict. He opines that a soldier in such a circumstance would only face liability for acts that are war crimes when committed in the context of a non-international armed conflict; Zimmermann 2007, pp. 218–219.

[40] Sandoz et al. 1987, para 107.

[41] Kalshoven and Zegveld 2011, p. 85.

Pronouncements during the conflict by those leading the relevant 'people' in its struggle will not necessarily be determinative as to these aspects. In addition, the legitimacy of the liberation movement must be adequately recognized. The UK Manual refers to recognition by the appropriate regional inter-governmental organization as being a minimum.[42] In addition to these requirements, the authority representing the people must undertake to apply API and the Geneva Conventions[43]; however, such an undertaking has the effect of imposing on the state and the authority representing the people the rights and obligations in API and the Geneva Conventions,[44] including those relating to prisoner of war status. It should be noted that the UK made a statement on ratification of API that it would not be bound by a declaration of this sort unless UK expressly recognized it was made by an authority representing the people engaged in such an armed conflict.[45] As Marco Sassoli has noted,

> [i]ndependently of whether a non-State actor such as a national liberation movement will ever be able to comply with such detailed and sophisticated rules of IHL of international armed conflicts as those governing the treatment of prisoners of war or occupied territories, only few situations will be recognized today by States as fulfilling these criteria – and, what is more important, none will be recognized by the territorial State as being national liberation wars.[46]

If, however, API were to apply to such a conflict, this would be an armed conflict that is essentially internal in character but in which combatant status would be enjoyed by members of the armed forces on both sides and in which all captured combatants would have entitlement to prisoner of war status and to the resulting rights and privileges as set out in the Prisoner of War Convention and in API. The treaty-based targeting rules as expressed in Articles 48–67 of API will

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[42] UK Manual 2004, para 3.4.2b, p. 30.

[43] API, Article 96(3). Consider, for example, the statement made by the PKK to the United Nations on 24 January 1995 as follows: "In its conflict with the Turkish state forces, the PKK undertakes to respect the Geneva Conventions of 1949 and the First Protocol of 1977 regarding the conduct of hostilities and the protection of the victims of war and to treat those obligations as having the force of law within its own forces and the areas within its control." Turkey was and is not party to API, www.icrc.org viewed on 22 September 2013.

[44] UK Manual 2004, para 3.4.2b.

[45] Statement (d) made by the UK on ratification of API on 28 January 1998. For an assessment of the UK position on Article 1(4), see Fleck 2013, pp. 583–584.

[46] Sassoli 2010, pp. 11–12. Sandesh Sivakumaran comes to similar conclusions, noting that not a single state has acknowledged, nor will they acknowledge, being involved in a war of national liberation; Sivakumaran 2012, p. 220. The combined effect of Article 96(2) and (3) of API seems to be that a state party to API will only be bound to recognise a conflict as coming within Article 1(4) if, in addition, the authority representing the people engaged in the conflict accepts and applies the provisions of the Protocol, presumably by means of an undertaking under para (3). For the view that Article 1(4) of API classifies the conflicts to which it refers by reference to motive and thus politicizes humanitarian law, see Corn et al. 2012, pp. 89–90 citing Ronald Reagan, Letter of Transmittal, The White House, 29 January 1987.

apply if the armed conflict takes place on the territory of a state party to API, as will the minimum fundamental guarantees set out in Article 75 of API.

There has, however, never been an armed conflict to which Article 1(4) was applied,[47] and there is the distinct possibility that the provision will become somewhat redundant.[48]

2.2.3 *Non-international Armed Conflicts to Which Additional Protocol II (APII) Applies*

Non-international armed conflict occurs when there is protracted armed violence between governmental armed forces and the forces of one or more armed groups, or between the forces of such armed groups.[49] The armed activities of the rebels may for example take the form of insurrection, insurgency and guerilla, including urban guerilla, warfare.[50] The violence must reach a certain level of intensity and the parties to the conflict must have at least a certain minimum level of organization.[51] Most modern armed conflicts are non-international in character involving a variety of kinds of armed groups.[52]

However, non-international armed conflicts fall into two categories and, consistently with the overall framework of this chapter, we will start with such conflicts to which the more extensive body of treaty law applies, namely those which come within the second Protocol additional to the Geneva Conventions, APII. The Protocol develops and supplements Common Article 3 of the Geneva Conventions[53] (which we will discuss in the next section) without modifying its existing conditions of application[54] and relates to:

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[47] Akande 2012, p. 49, but note that some groups have reportedly attempted to make Article 96(3) declarations; Sivakumaran 2012, p. 221. For a discussion of the Article 1(4) provisions, see Solis 2011, pp. 123–125.

[48] Consider Greenwood 1983, pp. 48–49.

[49] David Graham takes the view that this 'protracted' requirement, based on the *Tadic* judgment, para 70 and on Rome Statute 1998, Article 8(2)(f), does not require that the hostilities be continuous; Graham 2012, p. 48 and *Prosecutor v. Tadić*, Case Number IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

[50] For a discussion of the doctrinal aspects of these terms see Haines 2012a, pp. 21 and 22.

[51] Tallinn Manual, Rule 23.

[52] Haines 2012a, p. 13 discussing the notion of 'war among the peoples' in Smith 2006. Note, however, the suggestion in the UK Ministry of Defence, DCDC, Future Maritime Operational Concept 2007, 13 November 2007, at para 109 that the transition from the unipolar strategic world to a multi-polar one may result in an increase in state on state conflict.

[53] 1977 Geneva Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (APII), Article 1(1).

[54] The applicability of Article 3 Common to the 1949 Geneva Conventions will be considered in the next section of this chapter.

> all armed conflicts which are not covered by Article 1 of [API] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement th[e] Protocol.[55]

This provision needs careful analysis. The opening reference to armed conflicts not covered by API makes it clear that international armed conflicts and those covered by Article 1(4) of API are excluded from the application of this Protocol. The armed conflict must take place within the territory of a state that is party to the Protocol.[56] 'Territory' for these purposes will include territorial sea and national airspace. The treaty only applies to armed conflicts between the armed forces of the state and dissident armed forces or other organized armed groups. The Protocol does not therefore apply to armed conflicts between different elements of dissident forces, nor to conflicts between dissident forces and organized armed groups nor to armed conflicts between organized armed groups.[57] There must be the national armed forces on one side[58] and either dissident armed forces or an organized armed group, or both, on the other side.

The term 'armed forces', for these purposes, will include all of the armed forces of the state including law enforcement and similar agencies.[59] However, the relevant force or agency must, of course, be 'armed'.

Mike Schmitt notes that "the phrase 'dissident armed forces' is used in contradistinction to 'other organized armed groups'" but observes that "there is no meaningful difference in the legal regimes governing the detention or targeting of the two categories".[60] Meltzer comments that although members of dissident armed forces are no longer members of state armed forces, they do not become civilians merely because they have turned against their government, and so long as they remain organized under the structures of the state armed forces, those structures should continue to determine membership in the dissident force.[61] As Mike Schmitt correctly states,

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[55] APII, Article 1(1). See the explanation of such conflicts at Dinstein 2012, pp. 404–405.

[56] In Marco Sassoli's view, the clear wording of Article 1(1) of APII excludes non-international armed conflicts abroad, Sassoli 2011, p. 55.

[57] Dapo Akande points out that the Protocol does not therefore apply to hostilities between an organized group and States intervening to assist the government: Akande 2012, p. 55.

[58] For a discussion of the status of governmental armed forces in a non-international armed conflict, see Watts 2012, pp. 145–66.

[59] Sandoz et al. 1987, para 446: "The term 'armed forces' of the High Contracting Party should be understood in the broadest sense….. including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)."

[60] Schmitt 2012c, p. 35.

[61] Melzer 2009, p. 32.

> merely having been members of the armed forces of a State does not suffice to qualify individuals as members of a dissident armed force […]. Fighters who are former members of the armed forces, but have not remained with their units (such as deserters), are either members of other organized armed groups or civilians directly participating in hostilities.[62]

There are then three essential requirements placed on the dissident force or organized armed group before APII will become applicable. First, they must be under responsible command, which the APII Commentary interprets as requiring an organization capable of planning and carrying out sustained and concerted military operations and of imposing discipline in the name of a *de facto* authority.[63] The APII Commentary makes it clear that it is the capability of the authority to do these things that is critical, whether or not such operations are actually undertaken and such discipline is actually maintained. However, the actual conduct of such operations and the factual maintenance of discipline will be relevant to the determination whether such responsible command exists.

Second, the rebels must control enough territory to achieve sustained and concerted military operations and to implement APII, for example by taking appropriate care of the wounded and sick and by according prisoners decent treatment. In some conflicts, the rebels never control territory for a sufficient period to enable APII obligations to be complied with. In others, substantial tracts of territory remain in the control of the rebels for extended periods of time so that the infrastructural requirements of APII can be met. Whether the treaty's rules are in fact complied with will be another matter, but if they are, this will be an important factor in determining the status of the conflict. The critical point is whether enough territory is controlled to enable sustained and concerted military operations to be undertaken and to enable the obligations in the Protocol to be implemented.[64]

Third, there must be an armed conflict. The protocol explicitly excludes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.[65] The conflict must be of a particular intensity to be

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[62] Schmitt 2012c, pp. 35–36.

[63] Sandoz 1987 at para 4463. Sandesh Sivakumaran points out that as the obligations imposed by the law increase, the degree of organization required of the armed groups increases. For a discussion of the organization and command requirements in relation to APII conflicts, see Sivakumaran 2012, pp. 184–185 and as to 'organisation', see Sassoli 2011, pp. 57–59.

[64] The focus should not be on the absolute amount of territory that is controlled, but on whether enough is controlled to enable the required sustainment of operations and the required implementation to take place; Sivakumaran 2012, pp. 185–192. Actual breaches of the rules for example as to the treatment of prisoners by the rebels are bound, however, to make it less likely that the conflict will be recognized as coming within APII. Consider in this regard, for example, Black 2012, available at www.theguardian.com/world/2012/sep/17/syrian-rebels-accused-war-crimes and in relation to apparently more recent events of the same dreadful nature, Chivers 2013, available at www.nytimes.com/2013/09/05/world/middleeast/brutality-of-syrian-rebels-pose-dilemma-in-west.html?pagewanted=all&_r=0.

[65] APII, Article 1(2). As Masahiko Asada points out, by so providing, Article 1(2) excludes from the scope of application of Protocol II those situations that are to be regarded as internal affairs of the state concerned; Asada 2012.

regarded as an armed conflict. This means that the severity of the violence, the extent to which it is sustained and the degree and nature of the military involvement in it are all among the factors to consider in deciding whether an armed conflict is taking place. Sandesh Sivakumaran identifies a number of indicia to assist in deciding whether the violence has reached the requisite level of intensity. These include the number of incidents, the level, length and duration of the violence, the geographical spread of the violence, the deaths, injuries and damage caused by the violence, the mobilization of individuals and the distribution of weapons to them, the weapons used by the parties, the conclusion of ceasefire and peace agreements, the involvement of third parties whether the UN Security Council or other outside entities, the prosecution of offences applicable only in armed conflicts and the granting of amnesties.[66]

If military force is used within a state as a preventive measure to maintain respect for law and order this will not amount to an armed conflict.[67] Equally, the use of force by the state internal security authorities to deal with isolated riots or acts of terrorism and to maintain public order will also not constitute an armed conflict. This is because internal disturbances, sporadic acts of violence, certain terrorist activity and similar events are addressed by the domestic criminal law of the State where such events occur. The international law of armed conflict is only applicable when the state is no longer simply addressing criminal activity internally but, rather, is using armed force to prosecute an armed conflict that is under way within its borders.[68] In short, APII applies only to a full-scale civil war.[69] Leslie Green concludes that "[t]he definition of a non-international armed conflict in Protocol II has a threshold that is so high, in fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government".[70]

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[66] Sivakumaran 2012, p. 168.

[67] Sandoz 1987, para 4477.

[68] Note, for example, the reluctance of states in 1977 to agree more comprehensive provision in relation to non-international armed conflict was based in part on "fear of interference with their internal affairs"; Epping 2006, p. 5.

[69] Greenwood 2008, p. 55; consider also George Aldrich's complaint that Additional Protocol II is of little or no practical use in the sense that it is easy to deny its applicability; Aldrich 1984, pp. 135–136.

[70] Green 2008, p. 83 where it is noted that in none of the conflicts that occurred in the Soviet Union and in Yugoslavia prior to or during the dissolution of those states was there any suggestion that the situation was governed by Protocol II, whereas recognition accorded by some third states to Croatia, Slovenia and other Yugoslav republics indicated that the recognizing states considered international conflicts to be taking place. Leslie Green argues, however, that the Protocol II threshold is somewhat similar to that which prevailed during the Spanish Civil War when the Nationalist forces acquired recognition as a *de facto* administration with legal immunities similar to those enjoyed by the legitimate government. Guerilla or partisan movements would not therefore qualify, but would come within common Article 3; Green 2008, p. 349.

Certain states apply APII as a matter of policy to any non-international armed conflict coming within Common Article 3.[71] They constitute, however, different classes of conflict within our legal spectrum.[72]

2.2.4 Non-international Armed Conflicts Under Common Article 3

Article 3 appears in identical form in all four of the 1949 Geneva Conventions. Something of a mini-convention,[73] the article concerns itself with: "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties…".

These are therefore armed conflicts that are internal to a state but which do not necessarily comply with the APII limitations. So the armed forces of the relevant state are not necessarily involved in the armed conflict, which may exclusively be between dissident armed forces factions, or between organized armed groups, or between dissident armed forces and organized armed groups.

Additionally, it is not necessary to show that the rebels exercise any particular degree of territorial control. In particular, the ability of the dissident forces or groups to undertake sustained operations need not be attributable to the degree of their territorial control, neither must the degree to which they exercise such territorial control be sufficient to enable them to implement legal obligations such as those set out in APII.

To be an armed conflict within Common Article 3 certain criteria must however be met. At least one organized armed group, which might consist of dissident forces, having the required degree of organization must be involved in the conflict[74] and the

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[71] Armed conflicts to which Common Article 3 to the Geneva Conventions applies are discussed in the next section.

[72] Dieter Fleck makes the point that due to its high threshold of application, "the range of applicability of APII is extremely reduced in modern armed conflicts"; Fleck 2013, p. 587.

[73] UK Manual 2004, para 3.6.

[74] Tadic Jurisdiction Judgment, para 70; AMW Manual, commentary accompanying Rule 2(a), para 5. Interpreting the reference in Article 8(2)(f) of the Rome Statute to "protracted armed conflict" and to "organized armed groups", the ICC Trial Chamber in the case of *Prosecutor v. Thomas Lubanga Dyilo* commented "this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time"; *Prosecutor v. Thomas Lubanga Dyilo*, Case ICC-01/04-01/06, Judgment dated 29 January 2007 at para 234. Note that the Commentary to the Geneva Conventions identifies the following criteria for determining the existence of a Common Article 3 armed conflict, namely: "(1) That the Party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention; (2) That the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory; (3) (a) That the *de jure* government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c)

hostilities must achieve a certain level of intensity.[75] The case of *Prosecutor v. Ramush Haradinaj* identifies certain indicators as to the 'organization' criterion, namely whether a command structure exists, whether there are disciplinary rules and mechanisms, the existence of a headquarters, control of certain territory, access to weapons, other military equipment, recruits and military training, the ability to plan, coordinate and execute military operations, the ability to define a unified military strategy and to use tactics, to speak with one voice and to negotiate agreements such as ceasefires.[76] Sandesh Sivakumaran identifies three main reasons for the requirement that the armed group be organized. These are that the requisite intensity

(Footnote 74 continued)
That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression; (4) (a) That the insurgents have an organization purporting to have the characteristics of a State; (b) That the insurgent civil authority exercises *de facto* authority over the population within a determinate portion of the national territory; (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war; (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention;" Pictet 1960, p. 36.

[75] *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber Judgment, 30 November 2005 at para 90. See also the ICTR case of *Akayesu* which proposes an evaluation test in which the intensity of the conflict and the organization of the parties are considered; Case of *Akayesu*, Case No. 96-4-A, Appeal Chamber 1 June 2001 at para 91. Louise Arimatsu applies loss of human life and the scale of injury, level of destruction to social infrastructure and disruption to normal life as exemplified by displacement of populations as evidence as to the intensity of the violence when reaching the conclusion that the violence in Eastern Zaire in 1993 and from 1994 reached the threshold for Common Article 3 to apply; Arimatsu 2012, pp. 152–153. Consider the *Abella* case in which the Inter-American Commission on Human Rights considered the concerted nature of the hostilities, the direct involvement of members of the armed forces and the nature and level of the violence; Commission Report on *Juan Carlos Abella v. Argentina*, Case Number 11.137, 1997 Inter-American Yearbook on Human Rights, p. 684, para 155; the discussion as to intensity in Fleck 2013, pp. 593–595; the factors identified by Robert Chesney in Chesney 2010, p. 31; and Dinstein 2012, pp. 403–404.

[76] *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment, 3 April 2008 para 60. The armed group itself may issue a declaration setting out the way in which it is organized; consider for example the Declaration made by the National Liberation Army that fought in the Former Yugoslav Republic of Macedonia in 2001, reproduced in Sivakumaran 2012, p. 171. As Sandesh Sivakumaran points out, however, while such a declaration may evidence the view of the armed group, it must be assessed in the light of the facts on the ground and, in the event of inconsistency, it will be the facts on the ground that will prove determinative; Sivakumaran 2012. However, the context in which the armed group is operating must be taken into account when assessing its degree of organization. Where, as will frequently be the case, it is operating in conditions of secrecy as an underground organization, this may be a relevant factor when considering the various indicia that have been suggested; Sivakumaran 2012, pp. 172–177. As to the difficulties involved in applying the 'organization' criterion to virtual organizations of individuals engaged in cyber activities, see Schmitt 2012a, pp. 462–464. See also ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 8.

of violence may depend on the armed group being organized; that organization suggests that the violence is of a collective nature rather than being carried out by random individuals and that organization enables the armed group to comply with the law of armed conflict. Of these reasons, he concludes that the final two are the most important and that it is the notion of 'parties to a conflict' with the associated responsibilities that differentiates armed conflicts from internal tensions.[77]

The expression 'armed conflict' is not defined in the treaties. However, in *Prosecutor v. Tadić* it was suggested: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State".[78] Jelena Pejic identifies 7 scenarios that, in the last 2 cases not without controversy, are included within the typology of non-international armed conflicts, namely and briefly, government forces fighting organized armed groups; organized armed groups fighting each other within a state; conflicts of the first type that spill over into a neighbouring state's territory; multinational armed forces fighting alongside host state armed forces in its territory against organized armed group(s); UN or regional organization forces that become involved in similar situations to that previously described; a non-international armed conflict may exist alongside an international armed conflict when forces of a state are engaged in hostilities with a non-state party operating from a neighbouring state's territory but without the latter's control or support; and conflicts of the sort between Al-Qaeda and its affiliates and the United States.[79] Francoise Hampson explains that the reference to 'protracted armed violence' introduces a temporal notion into the definition of non-international armed conflict.[80]

Common Article 3 binds all parties to the armed conflict, requiring that those taking no active part in the hostilities or who have been rendered hors de combat must be treated humanely and without discrimination on grounds set out in the Article. They must not be subjected to violence to life and person; mutilation; cruelty and torture; hostage-taking; outrages on personal dignity; passing of sentences and carrying out of executions without proper process and the wounded and sick must be collected and cared for.[81] These are the minimal standards that must pertain in all non-international armed conflicts. Charles Garraway points out that the ICRC attempt in 1949 to apply the Conventions as a whole to non-international

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[77] Sivakumaran 2012, p. 177. As to non-international armed conflicts within common Article 3, see Green 2008, pp. 72–75.

[78] *Prosecutor v. Tadić,* (1996) 105 ILR 419, 488.

[79] Pejic 2012, p. 82.

[80] Hampson 2008, p. 555, where the valid point is made that determining whether violence is sporadic and thus not non-international armed conflict under Common Article 3 or protracted, and thus non-international armed conflict by virtue of *Tadić* may not be straightforward. Ken Watkin agrees that determining when violence reaches the level of an armed conflict is both factually and legally difficult. Moreover, the determination will not, according to the International Criminal Tribunal for Rwanda, be left to the State; Watkin 2007, p. 289 and see *Prosecutor v. Akayesu*, Case No. ICT -96-4-T, Judgment, 2 September 1998 at para 603.

[81] Common Article 3(1) to the Geneva Conventions, 1949.

armed conflicts failed because States were not prepared to go that far in allowing international supervision of their internal affairs.[82] Consider, however, the determination by the Bush Administration that the Geneva Conventions did not apply to Taliban and Al-Qaeda detainees as they were 'unlawful combatants' with the result that they had no protection under either Geneva Convention III or Common Article 3, a blanket denial of protection that Francoise Hampson correctly characterizes as contrary to the Conventions.[83]

If, however, an armed conflict meets the APII criteria and if that Protocol applies to it, the obligations in Common Article 3 must be complied with as well as those in the Protocol. Moreover, parties to an armed conflict regulated by Common Article 3 should endeavour to bring into force by means of special agreements all or parts of the other provisions of the Conventions.[84]

However, conflict situations may in practice be somewhat more complex than the discussion so far might suggest.[85] Whether an international armed conflict existed in Bosnia-Herzegovina in May 1992 was considered by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.[86] The Appeals Chamber held that the conflict or conflicts had both international and non-international characteristics.[87] Moreover, the reference in Common Article 3 to 'the territory of one of the High Contracting Parties' "does not prevent a non-international armed conflict from straddling more than one State".[88] Marco Sassoli must be right when he opines that "even a conflict spreading across borders remains a non-international armed conflict".[89] Consider also the 2006 hostilities involving Israel and Hezbollah in Lebanon. Iain Scobbie's extensive analysis of the relevant events and of the status of the conflict leads to the conclusion that there are contradictory indicators as to whether an international or non-international armed conflict took place. He concludes that international and non-international armed conflicts took place in parallel and emphasizes that these were not moot issues. These classification issues profoundly affected the status of captured

[82] Garraway 2012, p. 96. John Murphy describes the provision in Common Article 3 as 'sparse' and 'inherently ambiguous'; Murphy 2012, p. 17.

[83] Hampson 2012, pp. 263 and 264.

[84] Common Article 3 to the Geneva Conventions, para 3.

[85] Dinstein 2010, pp. 26–27.

[86] Decision of 2 October 1995 in Case No. IT-94-1-AR72; 35 ILM (1996) 32.

[87] For a discussion of the implications of the decision in the *Tadić* case for the notions of international and non-international armed conflict, see Greenwood 1996, pp. 265–283.

[88] Akande 2012, p. 72. Note however the differing expert views as to the status of hostile activities taking place outside the territory in which the armed conflict is taking place. Kelisiana Thynne argues that to be regarded as linked with the non-international armed conflict, the hostile activities must have a direct impact on the conduct of hostilities in the country where the non-international armed conflict is centred, Thynne 2009, p. 174. Robert Chesney, on the other hand, contends that the central issue is whether the engagement, wherever in the world it occurs, is between the parties to the non-international armed conflict and if it is, then the law of non-international armed conflict applies to that engagement; Chesney 2010, p. 37.

[89] Sassoli 2011, p. 55.

Hezbollah fighters. "As the conflict was bifurcated, and the Israel-Hezbollah conflict was an extra-territorial non-international armed conflict, the question whether POW status should be accorded to Hezbollah fighters was irrelevant, and Israel dealt with them under its Detention of Unlawful Combatants law."[90]

Matters may become even more difficult if one of the entities involved in the conflict has the sort of nebulous, loosely associated composition typified by Al-Qaeda such that characterizing that entity as an organized armed group becomes problematic.[91] If the group using force against the government does not fulfil the organization criterion, the hostilities, however intense, will not amount to a non-international armed conflict with the result that uses of force by the security forces will have to comply with applicable domestic and human rights law.

Noam Lubell rejects the consent of the territorial state as the criterion for determining whether cross-border armed conflicts are international or non-international, preferring to focus on the parties to the conflict partly because "the determination and classification of an armed conflict must remain separate from possible violations of the *jus ad bellum*". The present author, however, disagrees. The violation of sovereignty is certainly an international wrong justifying certain action in accordance with the *jus ad bellum.* That dimension however does not alter the relevance that the lack of territorial state consent has for the characterization of the resulting hostilities. The use of armed force by one state in breach of another state's sovereignty seems to the preset author to constitute international armed conflict.[92]

These are of course important contemporary issues and there is no doubt that the varied and often complex characteristics of modern warfare do not always easily fit into the established framework differentiating international and non-international armed conflicts.[93] Moreover, and irrespective of the legal technicalities discussed in this section, there remains the important question identified by Gary Solis, namely who decides whether a non-international armed conflict is in existence? "Often, the ruling government simply announces that the insurgents are merely bandits, to be dealt with by the Government's paramilitary forces or

[90] Scobbie 2012b, pp. 417–419.

[91] Lubell 2012, pp. 426–429, but note the March 2010 assertion by US State Department Legal Adviser Harold Koh that "as a matter of international law, the U.S. is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law"; Speech at the Annual Meeting of the American Society of International Law, p. 7, 25 March, 2010, available at www.state.gov/s/l/releases/remarks/139119.htm. For a critical appreciation of the Obama Administration's position on the conflict, see Targeting Operations with Drone Technology: Humanitarian Law Implications, Background Note for the American Society of International Law Annual Meeting, 25 March 2011, pp. 4–8.

[92] Lubell 2012, p. 433.

[93] Watkin 2007, pp. 272–273.

national police."[94] Certainly, the Protocol has "seldom played a role in non-international armed conflicts".[95]

There is no combatant status, and therefore no combatant immunity, in non-international armed conflicts, so rebels who undertake hostile acts during such a conflict remain liable to prosecution under domestic law for, e.g. murder, criminal damage, wounding etc. whether those acts comply with or breach the law of armed conflict. Ken Watkin[96] contends, however, that there "is a strong argument supporting the existence of a customary norm of providing State security forces a form of 'privilege' in respect of the use of force in internal armed conflicts".

2.2.5 Occupation

No discussion of the legal spectrum of conflict is complete without a reference to belligerent occupation. Occupation is classically defined in the 1907 Hague Regulations as follows: "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[97]

Common Article 2 to the Geneva Conventions continues the application of the Conventions during all cases of partial or total occupation of the territory of a High Contracting Party even if that occupation is not resisted.[98] Article 6 of Geneva Convention IV provides that some elements of that Convention no longer apply one year after the general close of military operations. However, where a state of occupation is maintained beyond that one-year period, the Occupying Power, if it exercises the role of government in the occupied territory, must afford particular rights and protections listed in the article. API is also stated to apply during a state of occupation[99] but that application is not subject to the one-year limitation. Where persons have been detained but the occupation ends while they remain in

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[94] Solis 2011, pp. 102–103.

[95] Solis 2011, p. 131.

[96] Watkin 2012, p. 8.

[97] Hague Regulations, 1907, Article 42. Mike Schmitt explains that, in the context of the Iraq War, 2003, rear echelon troops not having arrived in sufficient numbers and composition to place Baghdad under Coalition authority, occupation only commences in such circumstances "when it is militarily feasible for the advancing forces to actually assume their occupation responsibilities". He goes on to observe that occupation commencement may be difficult to fix, that the occupation may be rolling, expanding or contracting as the territory controlled by the adverse army increases or diminishes; Schmitt 2012b, p. 365. As to the rights and duties of the occupying power, see Green 2008, pp. 284–296, Kalshoven and Zegveld 2011, pp. 60–61 and 62–66, and Thürer 2011, pp. 148–151. For a rather general discussion of belligerent occupation, see Kolb and Hyde 2008, pp. 229–234. For a detailed discussion of the law of occupation, see Rogers 2012, pp. 238–294.

[98] Common Article 2(1) to the Geneva Conventions, 1949.

[99] API, Article 1(3).

detention, GCIV and API will continue to apply to them until their ultimate release, repatriation or re-establishment.[100]

There are difficult legal issues as to the determination of what does or, respectively, does not amount to a termination of occupation; these issues and that determination are critical to the classification of an associated armed conflict as international or non-international. Iain Scobbie, taking the relevant factors into account, has reached the conclusion that notwithstanding the disengagement, Israel remains in occupation of Gaza.[101] Whether a state of occupation exists may be unclear and/or disputed. Ultimately it will be a question of fact to be determined by reference to the factors referred to in Article 42 of the Hague Regulations, 1907.[102]

2.2.6 Conflicts that are Not Armed Conflicts

Internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature to which Article 1(2) of APII refers are not armed conflicts and the law of armed conflict does not therefore apply to them. This may be the case simply because the intensity and/or the level of sustainment of the violence falls below that required to constitute an armed conflict or because the armed group opposing the government fails the 'organization' test. The law that governs the activities undertaken in pursuance of such 'conflicts other than armed conflicts' is the domestic law applying in the territory where the acts occur, the domestic law of any other state that may have jurisdiction based on the nature of the relevant act and any applicable human rights law.[103] The rioters and those who use violence or who undertake similar acts related to such situations are therefore in breach of the domestic criminal law and are liable to be subjected to the relevant criminal law procedures and punishments. Some may choose to describe such activities as terrorism, or as an insurgency, or other terms may be employed. The important legal point is that such situations fall outside the law of armed conflict and within the aegis of applicable domestic law.

The term 'conflicts other than armed conflicts' may, to some, seem inaccurate because the terrorists, insurgents or criminals may well employ arms and

[100] See further for example Dinstein 2009; Gasser 2008, pp. 270–311; Greenwood 1992, pp. 241–266.

[101] Scobbie 2012a, p. 296.

[102] Consider the situation that arose following Israel's disengagement from Gaza from 2005 and the differing views of Israel, Hamas and of the international community discussed in Scobbie 2012a, pp. 290–294. For a good description of the practical application of occupation law in Iraq, see Schmitt 2012b, pp. 361–367.

[103] Pejic 2012, p. 85. For a discussion of what he describes as 'below the threshold situations', see Dinstein 2012, pp. 402–403. Consider Pictet 1960, pp. 35–36.

explosives to further their ends. Nevertheless, 'conflicts other than armed conflicts' is the term that will be employed in the present discussion.[104]

The term 'law enforcement' is often and accurately used to describe the activities of the police and security forces in such situations. The United Nations General Assembly adopted a Resolution in 1979 incorporating a Code of Conduct for Law Enforcement Officials which notes that, in performing their duties, law enforcement officials must respect and protect human dignity, and must maintain and uphold the human rights of all persons. Force may only be used by them when absolutely necessary and to the extent required for the performance of their duty.[105]

The civil police force, or such other state security services as the law of the state may provide, is likely to have the prime responsibility in the state to maintain order on the streets, to detect and investigate criminal behaviour, to bring those responsible to the criminal courts and generally to maintain internal security. The courts have the task of hearing the evidence concerning alleged criminal activities, of deciding whether persons accused of such activities are guilty and of inflicting punishment as provided by the law of the state. Domestic law, as interpreted in the light of applicable human rights law, will determine the rights an individual has to challenge his detention, whether it be in connection with the investigation of criminal matters or for the maintenance of state security.

Yuval Shany draws attention to revision of what he describes as the 'law and order paradigm' in response to the challenges posed by terrorism, with the effect that a new balance is struck between security interests and individual freedoms. He points to targeted sanctions introduced by the UN Security Council against members and supporters of the Taliban (UNSCR 1267/1999) for which there is no judicial review; legislation introducing more flexible standards of investigation, detention and prosecution of terror suspects; the application of executive measures against terrorists outside the criminal law process; the authorization and regulation of coercive interrogation of terror suspects by Israel and the United States and Israel's policy of punitive house demolitions. He concludes that the common feature is the erosion of the human rights of terror suspects and the weakening of

[104] Note that the 'troubles' in Northern Ireland from 1968 to 1998 were not treated as an armed conflict but that informed commentators have opined that from 1971 to 1974 the events occurring there reached the threshold of a Common Article 3 conflict; Haines 2012b, p. 143. Christine Gray notes the difficulty in getting governments to accept that a situation, rather than mere unrest, is a non-international armed conflict to which Common Article 3 or APII applies, but notes that "if the regimes for domestic unrest and internal armed conflict converge through the acceptance of fundamental humanitarian standards then the line between internal unrest and internal armed conflict will be less important"; Gray 2012, p. 95.

[105] United Nations Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution 34/169 dated 17 December 1979, Articles 2 and 3. See also Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, September 1990. As to Rule of Engagement issues in a situation that falls below classification as a non-international armed conflict, see McLaughlin 2012, pp. 308–309.

the judicial controls that support those rights.[106] It is therefore noteworthy that judicial proceedings, for example before the European Court of Justice, the US Supreme Court, the UK House of Lords and the Israeli Supreme Court have addressed such measures.[107]

There is an inherent fluidity in many conflict situations. What starts as an internal security situation falling short of armed conflict may develop into an insurgency in which sustained hostilities take place of such intensity as to amount to a non-international armed conflict. A state may become engaged in active support of the insurgents such as to internationalize the armed conflict. The assisting state might exercise belligerent occupation over territory that its armed forces have conquered and occupied during the hostilities. After the conclusion of the hostilities and the termination of the occupation, dissatisfied members of the defeated side to the conflict may then resume criminal activities including riots and isolated terrorist acts. The vital point is that the law that applies at any particular moment and/or location will depend on the factual state of affairs at that time and place. Controlling the activities of armed forces in compliance with what may be a rapidly evolving and diverse security situation is always likely to prove challenging.

This group of sections seems to suggest that certain identifiable criteria may indicate where in the current legal spectrum of conflict a particular situation can properly be placed. The criteria that seem most relevant are:

- whether states are involved in the conflict as parties thereto and, if so, how many and whether they are on opposing sides,
- whether acts of individuals or groups in connection with the conflict can be attributed to a state,
- the intensity, frequency and degree of sustainment of the hostile acts,
- whether and, if so, to what extent armed forces are involved,
- whether an organized armed group is involved in the hostilities,
- whether sufficient land is controlled by rebels in a non-international armed conflict for the purposes referred to earlier and
- whether one of the parties is seeking to exercise a right of self-determination in circumstances referred to in Article 1(4) of API.

[106] Shany 2011, pp. 17–19.

[107] See, respectively, Joined Cases C-402/05 and C-415/05, *P Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 September 2008; *Hamdan v. Rumsfeld*, 548 US 557 (2006) and *Boumediene v. Bush*, 128 S Ct 2229 (2008); *R v. Secretary of State for the Home Department* [2004] UKHL 56 and *Secretary of State for the Home Department v. JJ* [2007] UKHL 45; and *Mar'ab v. Commander of IDF Forces in Judea and Samaria*, HCJ 3239/02, PD57(2) 349, all discussed in Shany 2011, pp. 20–22.

2.3 The Changing Conduct of Conflict

The past one hundred years have seen radical changes in the ways in which armed conflicts are fought. At the beginning of that period wars were fought between states and were conducted primarily in two environments, namely on land and at sea.[108] Since 1990, the number of major armed conflicts has been declining and the number of inter-state conflicts as a proportion of the total has also been falling.[109] In the twenty first century, armed conflict may also occur in the air, in outer space and in cyberspace. While conflicts employing traditional means and methods continue to take place, modern military doctrine contemplates more mobile forms of expeditionary warfare, warfare employing remote attack methods and the employment of other, modern technologies.

Wars of the 21st century are often fought in densely populated areas, where combatants and civilians are in close proximity. "The fighting seldom takes place at close quarters; and the possibility of a decisive battle that would break the will of one of the warring parties, and bring an end to hostilities, does not exist"; indeed "neither side may be interested in peace" and "the chances that such a conflict will end decisively are rather slim" with the result that "the international law of war has become as irrelevant as national military rules of conduct".[110] A persistent feature of such modern wars is the degree of suffering that the fighting imposes on the civilian population. Acknowledged experts point out that "civilian suffering from the effects of armed conflict is greater today than at any time in history", noting that civilians are killed or wounded in almost every armed conflict in far greater numbers than combatants, with the disparity in casualty rates increasing to the point of reversing the proportions seen a hundred years ago, such that in modern conflicts ten civilians are killed for every one soldier. While one could debate whether all of the casualties described as civilian truly relate to persons taking no direct part in the hostilities, there is no doubt that the misery inflicted on civilians is far greater today than ever was the case in the past, as illustrated by the catastrophic numbers of refugees and of displaced persons fleeing the increasingly savage fighting in the Syrian Civil War.[111] It is therefore plain that

[108] The first treaty relating to the conduct of hostilities from the air was adopted in 1899 before the potential methods for conducting warfare from the air had been fully appreciated. It was not until shortly after 1913 that the potential offered by air warfare started to emerge and to be realized.

[109] Paul Vennesson observes that from 1990 to 2005, for example, "four of the 57 active conflicts were fought between states, Eritrea-Ethiopia (1998-2000), India-Pakistan (1990-1992 and 1996-2003), Iraq-Kuwait (1991) and Iraq versus the United States and its allies (2003)". One could, of course, add Afghanistan to this list. The number of civil wars rose from 2 in 1946 to 25 in 1991, then it dropped but has risen slowly since 2006; Vennesson 2011, p. 250.

[110] Thürer 2011, p. 247 drawing on Kellenberger and Münkler.

[111] Corn et al. 2012, pp. 279–280 and note 5 citing Foulkes 2009 and see Cumming-Bruce 2013, available at www.nytimes.com/2013/09/03/world/middleeast/flow-of-refugees-out-of-syria-passes-two-million.html?_r=0.

those whom the law seeks to protect are suffering in greater numbers despite that protection, which clearly demonstrates the importance of the enhanced compliance with and enforcement of the law advocated in Chap. 12.

Whether one accepts that there is something fundamentally new about so-called 'new' wars, or whether, as the present author does, one sees a continuous process of technological and doctrinal evolution at work is an issue that is largely peripheral to the central focus of this book, concerned as we are rather with the law that applies and how the new features of war that we observe affect, and are affected by, the law. More importantly, the author rejects Daniel Thürer's contention that international law has become irrelevant. It may be that the participants in some conflicts choose to break its rules, but continuing to strive for compliance with those rules is vital if we are to prevent the descent into wholesale slaughter, chaos and enduring conflict.

If the means of warfare, and the methods by which it is conducted, are evolving as discussed, respectively, in Chaps. 5 and 6, so too have there been developments in the characteristics of the participants. These changes are discussed in Chap. 7. They have potential impact, however, on the legal spectrum of conflict. Thus, if violent acts undertaken in a state that would ordinarily constitute breaches of the criminal law occur with the specified level of severity and frequency and involve participation in the conflict by organized armed groups, a non-international armed conflict may exist. While the motivation for the violent activities of the participants may well often be political, the question arises whether violent activities that otherwise satisfy the intensity, frequency and organization criteria but which are entirely motivated by private criminal gain can nevertheless also constitute non-international armed conflicts.[112] Mike Schmitt notes the traditional view that non-international armed conflict only applies to politically motivated challenge but comments that classifying high intensity events as non-international armed conflicts would empower a state to use military force and would make practical sense.[113] Organization and intensity requirements still apply, however, and 'organization' involves the capability to plan and carry out sustained military operations and impose discipline in the name of a *de facto* authority.[114]

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[112] Elizabeth Wilmshurst has drawn attention to war's increasingly criminal element and the resulting blurring of the distinction between war and organized crime; Wilmshurst 2012, p. 1. For a discussion of the motives giving rise to what he describes as 'criminal warfare', see Haines 2012a, pp. 24–25. John Mueller characterizes as 'criminal warfare' violent conflicts dominated by criminals, bullies, hooligans, toughs, goons and thugs and in which combatants, evidently meaning the participants, are induced to wreak violence primarily for the fun and material profit they derive from the experience. He notes that such participants tend to be disobedient and mutinous and can be disinclined to fight when things become dangerous. As a result, disciplined warfare has emerged in which violence is inflicted because indoctrination and training instil a need to follow orders, "to observe a carefully contrived and tendentious code of honor, to seek glory and reputation in combat, to love, honor or fear their officers, to believe in a cause, to fear the shame, humiliation, or costs of surrender, or, in particular, to be loyal to and to deserve the loyalty of their fellow combatants"; Mueller 2012, pp. 141–143.

[113] Schmitt 2012d, pp. 122–123.

[114] Sandoz 1987, para 4663.

Logic suggests that if politically motivated criminal activity can transition to armed conflict so also ought it to be possible for non-politically motivated criminal activity to do likewise. However, states did not take that view when the Geneva Conventions of 1949 were being negotiated and seem unlikely to have changed their view.[115] 'War' between States as conceived before 1949 was an essentially public activity that was to a degree regulated within the overall aegis of public international law. Criminal activity in which the participants, whether comprising individual adventurers or groups that are armed, seek purely private criminal gain or gratification, really remains criminal in nature irrespective of the intensity and sustainment of the activity or the organization of those involved.[116]

However, the author acknowledges that differentiating such large scale, organized crime from the activities of armed rebel groups whose members are usually characterized by the challenged state as brigands, rebels or terrorists is always going to be most difficult and risks producing an unsatisfactory outcome. Such differentiation is likely to be made even more difficult if, as may well be the case, some members of the group take the opportunity to engage in ordinary crime for self-enrichment purposes, or use criminal activity to raise funds for the group.

It is, nevertheless, tempting to argue that an organized armed group that undertakes armed activities that reach the violence threshold required by common Article 3 but which are inspired by purely criminal motives, for example related to the drug trade, is involved in something other than non-international armed conflict. However, drawing such a distinction seems, on reflection, to be potentially challenging, partly because all use of violence in a non-international context is by definition criminal in nature[117] and partly because participation in an armed conflict may be motivated by a multiplicity of considerations,[118] the criminal

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[115] Pictet 1952, pp. 44 and 49.

[116] Noëlle Quénivet and Shilan Shah-Davis consider that these 'newest armed conflicts' are low-intensity, privatized or informal conflicts which may occasion more deaths than conflicts legally acknowledged as 'armed conflicts'. They note the violence is directly related to informal criminal economic activities such as drugs and the arms trade, undertaken "by individuals and street gangs who do not aim to replace the state, but rather, to secure control over their business and sometimes work *in lieu* of the state"; Quénivet and Shah-Davis 2010, pp. 7–8. Note the ICRC view as expressed in the ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, at p. 6. Perhaps the point here is the organization requirement for an armed group to qualify as a party to a NIAC. Criminal gangs will tend to lack the command structure that seems to be an essential element in such 'organization'; Quénivet and S Shah-Davis 2010, p. 9. For a discussion of the 'organization' requirement, see Schmitt 2012d, pp. 128–131.

[117] See the discussion of the characterization of armed groups in Sivakumaran and the related issue of implicit recognition, Sivakumaran 2012, pp. 204–209.

[118] William Reno notes that interrelated war and crime have become an integral element of global policy and cites the indictment of Charles Taylor, who was accused of conducting a criminal conspiracy, a common plan to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the government of Sierra Leone, to facilitate access to the mineral wealth and to install a government that would be well disposed to his interests and objectives in Liberia and in the region; Reno 2011, p. 220 citing Special Court for Sierra Leone,

nature of some or all of which is unlikely to be acknowledged by the party concerned. Distinguishing between criminal motivation based on financial greed and criminal motivation based on a thirst for power is likely to involve perceived differences that lack substance and which may sometimes lead to unattractive conclusions. Mats Berdal makes the point that "in war-torn societies characterized by extreme levels of socio-economic dislocation, persistent insecurity, and the collapse of entitlements, what would in normal circumstances be classified as criminal activities may well be impossible to distinguish from coping strategies and daily struggles for survival". He draws attention to the interpenetration of the legitimate and the illegitimate in many weak states and conflict-ridden areas, and observes that key assumptions on which the definition of organized crime is based may become problematic.[119] As Reno concludes, the "distinctions [between crime and war] are highly political and are apt to change from one context to another and among actors within a single context".[120] This would not, therefore, seem to be a safe basis on which to draw a distinction between applicable legal regimes.

However, these criminal matters will, it is submitted, continue to be regarded by states as within the exclusive competence of their internal security and police forces. The fact that such activities may be undertaken across borders and on a large scale seems unlikely to alter that qualitative appreciation. The large scale of the criminal behaviour, its violent character, the large number of deaths and injuries that are caused do not change the fact that crime for personal gain or gratification on whatever scale is also, and will be seen by states as, a matter for investigation, detection, prosecution and punishment by the national police and court systems. Moreover, if concerted violent activity that meets all of the criteria associated with an armed conflict is undertaken for political motives, states would seem to be somewhat more likely to recognize that an armed conflict exists and that the relevant provisions of the law of armed conflict will apply.[121]

The violent, politically motivated acts undertaken for example by an organized armed rebel group in pursuance of a non-international armed conflict that breach the criminal law of the place where they are committed will render their perpetrators liable to trial and punishment. Ken Watkin points out that

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(Footnote 118 continued)
The Prosecutor against Charles Ghankay Taylor, Case No. SCSL-2003-01-1 (amended indictment), 16 March 2006.

[119] Berndal 2011, p. 109 at p. 127. Consider for example, Final Report of the UN Commission of Experts established pursuant to UN Security Council Resolution 780 (1992), May 1994, para 80, discussing the reliance of warring factions in Bosnia on looting, theft, ransoms and trafficking in contraband.

[120] Reno 2011, p. 235.

[121] Indeed, there will be circumstances in which drawing such a distinction will be difficult; consider for example the period following the second Congo War when much of the violence involved control over natural resources for financial gain. In discussing the matter, Louise Arimatsu notes the indifference of international humanitarian law as to the actor's motivation; Arimatsu 2012, p. 197.

> [t]oday a non-state actor can attain such a level of organization and sophistication that it poses a threat comparable to that presented by military forces acting for or on behalf of a state. […] The scale and effects of these attacks and their potential to be repeated or continued call for a response other than one focused exclusively on law enforcement.[122]

So while states in general will probably prefer to regard gang-based, organized crime as a matter to be dealt with exclusively employing law enforcement mechanisms, it is foreseeable that some states confronted by the greatest of such threats may prefer to treat the situation as a non-international armed conflict, particularly if the relevant criteria are met. The law relating to non-international armed conflict would then apply, including the provisions as to war crimes, the customary and treaty law rules relating to the conduct of the hostilities and the specific and general protections afforded to certain categories of individual and object, such as medical personnel, religious personnel, civilians, the wounded and sick and so on.[123]

2.4 The Emerging Legal Spectrum of Conflict

Having described the spectrum of conflict provided for in the current law, we shall now discuss how that spectrum might evolve in the foreseeable future.

There seems to be no basis for doubting the continuing relevance of the law of international armed conflict as the basis for the proper regulation of hostilities between states. However, it is appropriate to question whether the classification of 'wars of national liberation' under Article 1(4) of API as having the status of international armed conflicts remains appropriate. So far as is known, no conflict has yet been classified as coming within that provision, and, for the reasons mentioned earlier in this chapter, it seems unlikely that this will occur in the foreseeable future. API includes provision for the amendment of the treaty, specifically Article 97, and it would be for states party to decide whether such action is appropriate, for example on the basis that the sorts of colonial and anti-racist wars in contemplation when it was negotiated are no longer regarded by the international community as relevant. The more likely outcome is that the provision will simply be regarded as increasingly redundant[124] and will be ignored. It

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[122] Watkin 2004, p. 14. The phenomenon of failed or failing states, taken together with the proliferation of technologically sophisticated methods of delivering violence including weapons of mass destruction, generate the dangerous prospect of private actors operating outside the framework of state-based security; Watkin 2004, p. 14.

[123] Consider for example Schmitt 2012a, pp. 472–473.

[124] Examples of such treaty redundancy include the 400 gramme limit in the St Petersburg Declaration, 1868 and the provisions of Hague Declaration IV(1) of 1899 and Hague Declaration XIV of 1907 on the dropping of explosives from balloons.

certainly seems that Article 1(4) is unlikely to have future practical relevance in the legal spectrum of conflict that this chapter seeks to discuss.[125]

As has been often observed, the differences in the law applying, respectively, in international and non-international armed conflict are narrowing.[126] Christine Gray notes a growing perception that the existence of different regimes governing international and non-international armed conflicts is unsatisfactory given the humanitarian concerns common to both. While convergence will lessen the significance of the difference, the same commentator notes an increasingly accepted view that there should be one set of rules for all armed conflicts.[127]

The single most significant impediment in achieving such a single set of rules is the view of states that combatant status must remain exclusively applicable to international armed conflict and there are other fundamental distinctions between the situations governed by the two legal regimes. Marco Sassoli points out, for example, that the addressees of the law differ, in that the law of non-international armed conflict binds not only states but also armed groups, and that armed group commanders may not have the legal capacity to punish members who have committed violations of the law.[128] He questions whether it is possible to convince parties to comply with rules not binding on their enemy, citing for example the effect on the practical ability of armed groups to detain government soldiers of the suggestion that in non-international armed conflicts there is an obligation to provide to a person deprived of his liberty the opportunity to challenge the lawfulness of his detention.[129]

It is nevertheless worth noting that the legal rules that apply in the two classes of conflict are tending to converge specifically in relation to weapons law and targeting law. This convergence in relation to weapons law is discussed in Chap. 5,

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[125] It is understood that the United States does not accept the Article 1(4) provision. The US preference would be to treat Article 1(4) conflicts as non-international armed conflicts to which APII applies; Murphy 2012, p. 26. The UK accepted Article 1(4) by virtue of its ratification of API on 28 January 1998 subject to a relevant statement of interpretation which, in relation to Article 1(4) and Article 96(3), states: "It is the understanding of the UK that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The UK will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under para 3 of Article 96 unless the UK shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, para 4, applies."

[126] As Daniel Thürer notes, this is a favourable and reasonable development. "Human beings deserve the same protection, regardless of whether they are affected by a battle taking place within one country or across borders"; Thürer 2011, p. 52.

[127] Gray 2012, pp. 94–95.

[128] Sassoli 2010, p. 16. For a critique of the bifurcation of international humanitarian law between international and non-international armed conflict, consider Jensen 2010, pp. 702–706.

[129] Sassoli 2010, p. 17.

where it is concluded that for the law of weaponry applicable respectively in international and non-international armed conflict completely to converge, all states party to the Conventional Weapons Convention would have to ratify the 2001 scope extension, the Environmental Modification Convention would need to be applied to both classes of conflict, the limited exemption from the war crime associated with the prohibition on expanding bullets would have to be made applicable to international and well as non-international armed conflicts and the rules in Articles 35(3) and 55 of API would have to be extended to both classes of conflict. This seems to be the extent of the difference in the law of weaponry as it applies to each class of conflict. The differences in the law of targeting are addressed in the following section.

2.5 Differences in the Law of Targeting as it Applies in International and Non-international Armed Conflict

It is not intended in this short section to seek to address all aspects in which the law of targeting differs in its application to international and non-international armed conflicts.[130] Rather, we shall look at certain particular issues to get a general impression of the differences in its application to the two classes of conflict.

Lying at the root of many of these differences, the absence of combatant status in non-international armed conflict has numerous consequences. In the law of international armed conflict, civilians are defined in negative terms by reference to combatants.[131] In non-international armed conflict there therefore can be, and is, no such definition of civilians, and yet the term is used in texts reporting the law relating to non-international armed conflict, for example by the ICRC in Henckaerts and Doswald-Beck,[132] in APII[133] and by the authors of the NIAC Manual.[134] This immediately poses a challenge. While there is no doubt that the

[130] For a detailed discussion of the law relating to targeting during non-international armed conflicts, see Sivakumaran 2012, pp. 337–386.

[131] API, Article 50(1).

[132] See for example Henckaerts and Doswald-Beck 2005, Rule 1 and pp. 5–8 of the associated Commentary.

[133] APII, Article 13(1) and (2), refers to the civilian population and individual civilians enjoying general protection against the dangers arising from military operations, to a prohibition on making civilians the object of attack and to a prohibition of acts or threats of violence whose primary purpose is to terrorize the civilian population. Article 13(3) states civilians enjoy the protections in the relevant part of the treaty "unless and for such time as they take a direct part in hostilities'.

[134] NIAC Manual 2006, para 1.1.3: "Civilians are all those who are not fighters." The associated commentary states that "[f]or the purposes of this Manual, civilians who actively (directly) participate in hostilities are treated as fighters"; NIAC Manual 2006, p. 5. The problem with this approach is, of course, its conceptual illogicality. If civilians are those who are not fighters and persons who participate directly in the hostilities are fighters, then they cannot be civilians in the

principle of distinction applies in non-international armed conflict, the challenge lies in articulating the principle, particularly in its application to persons. The NIAC Manual refers to fighters as distinct from civilians. While the terminology might be problematic, however, some vital concepts with which we are familiar in relation to international armed conflict are transposed into the law of non-international armed conflict.[135] So, for example, the law of non-international armed conflict recognizes that civilians must not be made the object of attack except during such time as they take a direct part in hostilities. The concept of direct participation in hostilities and its implications for modern warfare will be discussed in more detail in Chap. 7 and will not therefore be further addressed here.

Where objects are concerned, APII contains no definition of military objectives and does not specifically oblige States to refrain from directing attacks at civilian objects, omissions which the ICRC Study contends are rectified by customary law.[136] Similarly, APII does not include rules on the precautions that the Parties to the conflict must take. Again, the ICRC Study finds that customary law provision is similar as between the two classes of conflict both in respect of the precautions that attackers are obliged to take[137] and in respect of the precautions that Parties to the conflict must take against the effects of attacks.[138]

However, while customary law in these respects may have some similarities as between international and non-international armed conflict, there are evident differences in the treaty law rules. Quite simply, the granularity of the targeting rules in Articles 48–67 of API is not reproduced in APII. So, while APII does make

(Footnote 134 continued)
first place. Perhaps, to a degree, the problem could be resolved by providing that persons who would otherwise be civilians but who directly participate shall be fighters. Perhaps that idea is what the 'are treated as' language seeks to, but does not quite succeed in, conveying.

[135] For example the principle of distinction itself and the rule relating to direct participation by civilians; see APII, Article 13(3).

[136] Henckaerts and Doswald-Beck 2005, Rule 7 and the associated Commentary, pp. 26–29. As the ICRC pertinently observes, Article 3(7) of Amended Protocol II to the Conventional Weapons Convention prohibits directing mines, booby-traps or other devices against civilian objects, and the war crime set out in Article 8(2)(e)(xxii) of the Rome Statute, 1998, is capable of being interpreted as supportive of the contended for customary rule. The fact remains, however, that there is no explicit generally applicable prohibition in treaty law to match that relating to international armed conflict in Article 52(1) of API.

[137] Henckaerts and Doswald-Beck 2005, Rules 15 to 21. Note, however, that while the ICRC asserts the applicability of the first six rules in both international and non-international armed conflict, it considers that the seventh only arguably applies in the latter. The seventh rule states that where a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects; Rule 21.

[138] Henckaerts and Doswald-Beck 2005, Rules 22–24, although the last two rules are only considered 'arguably' to apply in non-international armed conflict. These latter Rules require that each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas and remove civilian persons and objects under its control from the vicinity of military objectives.

particular provision, for example as to works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations,[139] as to cultural objects and places of worship[140] and as to objects indispensible to the survival of the civilian population,[141] the detail of the legal provision in APII is inferior to that in API to such a degree as to be inadequate.[142] So, for example, the non-international armed conflict treaty rule as to works and installations containing dangerous forces, unlike its API counterpart, contains no specific rule dealing with the attack of military objectives located in the vicinity of such facilities and lacks the detailed provisions on when the special protection ceases.[143]

In Chap. 5, we discuss differences in the protection of the environment as between international and non-international armed conflict.

Where cultural objects are concerned, Article 53 of API by definition applies only in international armed conflict. The much more comprehensive protections in the Hague Convention 1954 apply fully during international armed conflict and during periods of belligerent occupation.[144] During non-international armed conflict, however, the Convention only obliges states party to apply "as a minimum, the provisions […] which relate to respect for Cultural Property".[145] The Second Protocol of 1999 applies during international armed conflict and belligerent occupation[146] but not during non-international armed conflict, which constitutes an additional and significant difference in the legal arrangements associated with the two classes of conflict.

Another, more general, difference between international and non-international armed conflicts is that, while all parties to the former, being states, have the right to be involved in formulating the law that regulates such conflicts, armed groups involved in non-international armed conflicts have no involvement in formulating the law that binds them. Marco Sassoli poses the question why should non-state actors be bound by the same rules as states. After considering, *inter alia*, practice and *opinio juris* of such groups and a possible customary principle that the obligations accepted by the government of the territorial state apply to groups fighting there, he notes that while there is no controversy that such groups are bound by certain IHL rules, there is controversy as to why this is so.[147]

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[139] APII, Article 15.

[140] APII, Article 16.

[141] APII, Article 14.

[142] Solis 2011, p. 129 citing Roberts and Guelff 2000, p. 482.

[143] There is, for example, no equivalent in APII to the detailed provision in the second sentence of Article 56(1) of API and in Article 56(2).

[144] Hague Cultural Property Convention, 1954, Article 18(1) and (2).

[145] Hague Cultural Property Convention, 1954, Article 19(1). The obligation to respect cultural property is set out in Article 4. The distinct obligation to respect cultural property is reflected in Articles 2, 8 and 9 and the additional obligation to safeguard cultural property is provided for in Article 3.

[146] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

[147] Sassoli 2010, pp. 13–14.

So there are highly significant differences in the treaty arrangements for the two classes of conflict. It must be recalled that when treaty and customary law contain similar rules on a particular subject, the two rules are nevertheless distinct. Self-evidently, to the extent that customary law contains similar rules in relation to international and non-international armed conflict, this will tend to close the gap in effective legal provision. However, the degree to which customary law actually fills that gap is debatable.[148] While the ICRC Study, as we have seen, argues that in a number of important respects it does, not all commentators agree[149] and the United States has expressed its serious reservations as to certain conclusions reached in the ICRC Study.[150]

We can, it seems, conclude from this and the previous section that there are, and are likely to remain, substantial and important differences in the law applying to international and non-international armed conflict for as long as states view the two kinds of conflict as fundamentally distinct.[151] The tendency towards convergence of the two elements of law was enhanced by the Rome Statute's articulation of war crimes applicable in non-international armed conflict. That said, the war crimes enumerated in Article 8(2)(b) of that Statute differ in significant respects from those listed in Article 8(2)(c) and (e). The convergence process has its limits. If international and non-international armed conflicts must remain distinct features of our legal spectrum of conflict, the next question that arises is whether non-international armed conflicts should continue to be divided between those to which CA3 alone applies and those that are also regulated by APII.

2.6 The Legal Distinctions Between CA3 and APII Conflicts

As we saw in Sect. 2.2.4, Common Article 3 applies to all non-international armed conflicts whereas APII applies only to those non-international armed conflicts that satisfy the fairly stringent criteria set out in Article 1 of that treaty. Common

[148] Moreover, as Dapo Akande points out, whenever states have been presented with the opportunity to abolish the distinction between international and non-international armed conflict, they have been reluctant to do so and undeniably the rules as to status of fighters and as to detention of combatants and civilians differ; Akande 2012, p. 37.

[149] See, for example, Wilmshurst and Breau 2007.

[150] Initial Response of U.S. to ICRC Study on Customary International Humanitarian Law with Illustrative Comments, letter from US Department of State Legal Adviser and the US Department of Defense General Counsel to Dr J Kellenberger, President of the ICRC, dated 3 November 2006 available at www.state.gov/s/l/2006/98860.htm.

[151] States are concerned that "equating non-international and international armed conflicts would undermine State sovereignty and, in particular, national unity and security"; there are also the risks that secessionist movements would be encouraged, that the hand of the state would be restrained thereby when seeking to put down a rebellion and that acts they regard as treasonous would no longer be criminal; Akande 2012, p. 37 and Bugnion 2003, p. 168.

Article 3 contains some basic protective provisions, and APII, while its provisions are somewhat more extensive, is markedly less comprehensive than the legal arrangements in API and elsewhere that regulate the conduct of hostilities in international armed conflict. The majority of modern armed conflicts are non-international in character,[152] and there is as we have seen controversy as to the extent to which customary rules that apply to international armed conflict extend to non-international armed conflict. The resulting uncertainties surrounding the law of non-international armed conflict and any associated gaps in its provision are unfortunate and there are suggestions, discussed in Chaps. 9 and 10, that the law of human rights in some way fills those gaps.

Given that states have not as yet made more extensive treaty provision, for example in relation to non-international armed conflict, it is perhaps unsurprising that for this and other reasons we have in recent years seen a number of initiatives for the preparation of international manuals in an apparent effort to clarify the law on particular topics relating to armed conflict. While this effort, and the motives that generate it, are to be applauded, the preferred course of action in an ideal world would be for states to address any deficiencies in the law by negotiating and adopting modern treaty rules that deal with the conduct of hostilities in non-international armed conflict in a thorough way. However, lack of global consensus on these matters may mean such a negotiation is not yet feasible and there is always the danger that a fresh negotiation will produce less satisfactory arrangements than the less than adequate provision we currently have.

The question nevertheless arises whether any new law should maintain the distinction between common Article 3 and APII conflicts, i.e. a distinction based on whether the dissident armed forces or organized armed groups under responsible command exercise control over such territory as to enable them to conduct sustained and concerted military operations and to implement the Protocol. There is no doubt that, as Marco Sassoli has clearly demonstrated, legislating exclusively for non-international armed conflicts exclusively by reference to the capacities of states to act is liable to produce law some of which armed groups will be unable to implement. The territorial control criterion in APII reflects this reality by seeking to limit the application of more prescriptive rules to circumstances in which both parties to the non-international armed conflict are, by virtue of territorial control, able to comply. A division in the legal arrangements on that sort of basis is therefore inevitable if the more prescriptive rules are to be practically applicable by both sides in such conflicts.

One could sensibly discuss whether all of the limitations in Article 1(1) of APII are necessary. As Sandesh Sivakumaran points out most reasonably, if the Protocol can be applied by an armed group that is fighting against a state there would seem to be no reason why it cannot be applied by an armed group that is fighting against

[152] See for example ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 5.

another armed group.[153] Responsible command and such territorial control as enables the organized armed group to apply the Protocol would seem to be essential requirements for the applicability of the more prescriptive legal rules. Whether the territorial control should continue to be linked to the ability to carry out sustained and concerted military operations is debatable. The important point from the perspective of the current discussion is that there is continued utility in the bifurcation of non-international armed conflicts into those to which more prescriptive rules, such as those in APII, do and, respectively, do not apply. Thought might, however, be usefully given to whether the APII applicability criteria would benefit from minor adjustment.[154]

If the absence of combatant immunity applies to all non-international armed conflicts, and if the rebels therefore by definition breach criminal law, there will always be limits to the degree to which protections that apply to those who participate as combatants in international armed conflicts can be extended to those who participate against the government forces in non-international armed conflicts. We should, however, consider the position in relation to combatant immunity a little further. While states seem to be fundamentally opposed to the grant of combatant immunity to rebels in non-international armed conflicts, somewhat lesser arrangements are sometimes made and may provide a useful basis for a way ahead. Article 6(5) of APII requires the authorities in power at the end of the hostilities to endeavor to grant "the broadest possible amnesty" to persons who participated in the armed conflict or who were deprived of their liberty for reasons related to the armed conflict. Sandesh Sivakumaran explains, however, that the reference to 'the broadest possible amnesty' should not be misinterpreted as including violations of international humanitarian law.[155] It has, however, been observed that providing amnesty to members of armed groups for taking part in hostilities may incentivize compliance with the law of armed conflict.[156] Sandesh Sivakumaran points out that pursuant to agreements at the conclusion of the American Civil War between Generals Grant and Lee and Sherman and Johnson in April 1865 Confederate officers and fighters were not subjected to criminal prosecutions, that a declaration was made by France during the Algerian War in 1958 to the effect that bringing prisoners before courts would be systematically avoided subject to certain exceptions, that at the conclusion of a war in Nigeria from 1967 to 1970, the Federal Government did not prosecute rebel force members

[153] Sivakumaran 2012, p. 184.

[154] Marco Sassoli argues that the higher threshold for Protocol II may be realistic. He speculates that a sliding scale may be needed, with increasing obligations for armed groups according to their degree of organization, and the intensity of the violence in which they are involved although this, he acknowledges, would involve complications and controversies. It would imply lower standards for government forces involved in lower intensity conflicts, subject to over-riding human rights standards; Sassoli 2010, p. 20.

[155] Sivakumaran 2012, p. 507.

[156] Report of the Secretary General on the Protection of Civilians in Armed Conflict, S/2009/277, 29 May 2009, para 44.

and that an agreement was reached in 1992 between various conflicting parties in the former Yugoslavia that all prisoners not accused of or sentenced for grave breaches of International Humanitarian Law would be unilaterally and unconditionally released.[157] He argues convincingly that a way of approaching the issue of lack of combatant status for rebels is to "encourage non-prosecution for taking part in hostilities". While acknowledging that amnesties exist after the fact and are thus readily to be distinguished from combatant immunity, he observes that pursuant to Article 6(5) the relevant authorities must, arguably, actively consider amnesties, and that such an approach may enable a middle course to be navigated between the extremes of combatant immunity and criminal prosecution.[158]

Where the treatment of fighters during the period of their detention is concerned, reference should be made to the discussion in Chap. 8. Perhaps an announcement by the Government authorities during an armed conflict between its forces and rebels to the effect that captured rebels who cannot be shown to have breached International Humanitarian Law will be treated, as a matter of policy, as if the Third Geneva Convention applied to them would, again, incentivize compliance with that body of law by the armed rebel group.

2.7 How Do Crime and Transnational Terror Fit?

As we have seen, the distinction between non-international armed conflicts and conflicts to which the law of armed conflict does not apply is achieved in Article 1(2) of APII by excluding from the Protocol's application "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". Article 8(2)(d) of the Rome Statute excludes the same events from the war crimes listed in Article 8(2)(c), crimes that reflect breaches of Common Article 3. Similarly, Article 8(2)(f) excludes the same events from the war crimes in Article 8(2)(e) associated with armed conflicts to which APII applies.

The question that legitimately arises is whether more intensive, organized and violent criminal activity than that reflected in the cited language can properly be regarded as an armed conflict.[159] In an earlier section of this chapter, we discussed the distinction between politically motivated violence and violent or other activities exclusively motivated by personal enrichment or other criminal purposes.[160]

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[157] Sivakumaran 2012, pp. 515–517. Consider the correspondence between Lord Roberts and the President of the Boer Republic during the Boer War to the effect that captured fighters were not ordinary criminals and were not to be treated as such; Spaight 1911, pp. 280–281.

[158] Sivakumaran 2012, pp. 518–520.

[159] Consider for example piracy which is certainly criminal in nature but the countering of which may well require the deployment of military platforms and military personnel of more than one State, particularly when undertaken on a sufficient scale.

[160] It has, earlier in the present chapter, been noted that the activities of rebels in a non-international armed conflict may be expected to breach applicable criminal law. That appreciation

The point was made that the distinction between concerted violent crime, particularly when undertaken by an organized armed group, and non-international armed conflict is tending to blur. The tendency in modern times for violent acts of terror to be committed on a repeated, frequent and organized basis causes one to question whether the distinction between matters that remain the exclusively internal concern of a state and those which attract the application of the law of armed conflict remains valid.[161] It can however be powerfully argued that keeping disturbances, tensions, riots and isolated and sporadic violence outside the notion of armed conflict is the correct basis for the distinction, one which is as valid today as it was when states negotiated the matter in 1977 and in 1998. Repeated, frequent and organized violent acts are not 'isolated and sporadic'; they properly take the conflict into a category that differs from occasional, periodic crimes that can properly be handled by the police force.

Put that way, however, the difficulty becomes immediately plain. Terrorism is increasingly recognized as a major threat to the nation[162] and terrorism that transcends national borders poses particular challenges to the recognized legal spectrum of conflict.[163] Indeed, other transnational issues are also liable to form the basis for future conflict.[164] While some may regard confronting the dangers of

(Footnote 160 continued)
lies behind the use of the word 'exclusively' in the present sentence. Human rights law will of course apply to the activities that are undertaken to counter such criminal behaviour and to the handling of suspects including the conduct of any proceedings against them.

[161] Consider UN Charter, Article 2(4) and (7).

[162] DCDC, Global Trends at p. 59 and UK National Security Strategy at p. 11. Mike Schmitt summarizes the position succinctly: "there will be more terrorists, they will employ a wider array of techniques, they will be harder to identify and State sponsorship is likely to grow"; Schmitt 2012a, p. 464. Azar Gat identifies the implications of such developments in these terms: "A virulent, laboratory-cultivated strain of bacteria or virus, let alone a specially engineered 'superbug' against which no immunization and medication exist, might bring the lethality of biological weapons within the range of nuclear attacks and result in anything between thousands and many millions of fatalities, while being far more easily accessible to terrorists than nuclear weapons"; Gat 2011, pp. 40–41.

[163] Consider for example Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, paras 8–9 and 57 where the view is expressed that the Israel/Hezbollah conflict of 2006 amounted to a *sui generis* international armed conflict. By contrast, the United States Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) 66–69 regarded the armed conflict against Al-Qaeda to be covered by Common Article 3, and thus a non-international armed conflict.

[164] See, for example, UK Ministry of Defence, DCDC, Future Maritime Operational Concept 2007, 13 November 2007, para 109 which refers to transnational issues such as terrorism, climate change, demographic shifts, religious and ethnic tensions and increased competition for resources of all kinds as providing the potential for crisis, confrontation and conflict. The UK Ministry of Defence, DCDC, Future Land Operating Concept, JCN 2/12 dated May 2012 talks of renewed regional low-level conflicts, proxy wars, increased proliferation and resource competition; para 101.

terrorism as constituting part of international law dealing with conflicts of an international character,[165] as Mike Schmitt has pointed out, that leaves open what level of violence must be reached for the armed conflict threshold to be reached, the level applicable to international armed conflict or that applicable to non-international armed conflicts.[166] He notes the alternative, more restrictive interpretation of international armed conflict that would classify transnational terrorism as non-international armed conflict,[167] wonders whether the threshold must be achieved in a single state or can be achieved by amalgamating the violence across a number of states and recognizes that transnational terrorism might be legitimately classified by reference to the *lex scripta* as "simply egregious international criminality".[168] These are, of course, not academic issues. The debate has at its core the vital question as to which body of law applies to the violent events and what status is to be accorded to the participants.[169]

Frits Kalshoven and Liesbeth Zegveld also discuss which body of international law should be applied to extraterritorial operations of a state engaging in armed conflict with a non-state armed group on another state's territory. If the first state directs its military operations against the territorial state as well, the situation is an international armed conflict. "For all other situations, the main consideration should be one of law of war policy; any significant fighting on another state's territory requires the most complete, most solidly established set of principles and rules, that is, the law of international armed conflict."[170] The author would agree with this policy-based approach, subject to the thought that certain rules may be inapplicable in the particular circumstances or may not be capable of implementation by the armed groups involved.

Generally speaking, transnational terrorism will amount to criminal conduct that breaches the domestic law of the territory where it is committed, and to which

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[165] *Public Committee against Torture in Israel et al v. Government of Israel et al*, High Court of Justice, Israel, HCJ 769/02, 13 December 2006 at para 21.

[166] The logic favouring the latter notes that activities falling below the prescribed level would be classed as crime.

[167] Schmitt 2012a, p. 466 citing *Hamdan v. Rumsfeld*, 548 US 557, 631 (2006).

[168] Schmitt 2012a, pp. 465–468.

[169] Consider for example the hostilities between Turkey and the *Partiya Karkeran Kurdistan* (PKK) in Iraq; e.g. New York Times, 'Turkey says its planes raided guerrilla bases in Iraq', 5 March 1987; Al Jazeera, 'Clashes between "Turkish forces and PKK"', 20 October 2012; BBC, 'Iraq condemns Turkish "shelling"', 9 June 2007; CNN, 'Iraq condemns Turkish attacks', 18 December 2007 and consider the reports that these operations were undertaken without the consent of the territorial state, namely Iraq; Reuters, 'Iraq tells Turkey to stop pursuing Kurdish rebels over border', 2 October 2012; Reuters, 'Iraq warns Turkey against violating airspace of Kurdistan', 17 July 2012; and note, generally, Human Rights Watch, 'Iran/Turkey: Recent Attacks on Civilians in Iraqi Kurdistan', 20 December 2011.

[170] Kalshoven and Zegveld 2011, p. 221, where it is suggested that the sole exception might be a case of small scale military operations joining in the efforts of local government forces in an ongoing internal armed conflict, a situation that might, it is suggested, involve respect for locally applicable human rights norms.

states will usually apply law enforcement procedures. If the intensity and frequency of the violence, and the organized nature of the armed group involved, reach the armed conflict threshold in a particular state, then a non-international armed conflict may arise in that state. The existence of a non-international armed conflict in one state does not necessitate the classification of violent acts by the same organized armed group in another state as a non-international armed conflict. Similarly, the involvement of State A in a non-international armed conflict against an organized armed group in host State B does not necessarily imply that military operations by State A against the same organized armed group in and with the consent of State C will constitute a non-international armed conflict in State C. In short, the violence cannot be aggregated across borders in order to determine the existence of a non-international armed conflict. It is the situation in the particular state that will determine whether a non-international armed conflict is occurring within that state.

An important issue is how a state can lawfully undertake cross-border operations if, indeed, the notion of cross-border response to terrorist attack is considered lawful. If that is the case, Gary Solis suggests, and he must be right in arguing, that "before exercising self-defence in the form of a non-consensual violation of a terrorist-host state's sovereignty, an attacked state must allow the host state a reasonable opportunity to take action against the terrorist group".[171]

There can be no doubt that the phenomenon of transnational terrorism has challenged the previous broad acceptance of the distinctions that lie at the root of our legal spectrum of conflict. It is increasingly argued that the resulting conflicts in Afghanistan, Pakistan and possibly Yemen constitute non-international armed conflicts, a conclusion which assumes that the foreign forces involved in these conflicts are operating in support of or with the consent of the government of the relevant country. So the 'global war' is in reality a collection of individual wars. Each such war is 'on' the organized armed groups in that country that are perpetrating acts of violence including acts of terrorism. The foreign forces are constrained by any conditions associated with the consent of the relevant government, and if the foreign forces were to undertake violent acts against the forces of the relevant government, as opposed to with its consent, or otherwise in breach of the sovereignty of the territorial state, this might convert the conflict into an international armed conflict.

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[171] Solis 2011, pp. 162–163 where it is noted that care must be taken that only objects connected to the terrorists are targeted, but that if the terrorist group is a surrogate acting for the state harbouring it or if the host state is capable of acting against the terrorist group but refuses to do so, then the host state itself may be open to attack; Solis 2011, p. 163 citing Crawford 2002, p. 110. For an assessment of the US response to transnational terrorism, see Solis, 2011, pp. 164–167. For the view that the "distinction between terrorism and disciplined war is essentially quantitative", see Mueller 2012, p. 143. Central to the terrorist enterprise is provoking over-reaction by the security forces; Mueller, 2012, p. 145 and pp. 149–153, and Mueller concludes that policing crime and terrorism in order to reduce their frequency and destructiveness may be sensible policy, but that seeking to eradicate them entirely is illusory; Mueller 2012, p. 158.

Nevertheless, a state confronted with a terrorist threat remains entitled if it so chooses to treat the matter as an internal security situation to which it applies the criminal law paradigm. That was the position taken by the United Kingdom throughout the Northern Ireland 'troubles'.[172] By taking such a line, the national authorities limit their legitimate scope of action, of course, but that is within a state's sovereign discretion. Moreover, there is no reason why the position should change when the terrorist activity has transnational characteristics. It remains within the discretion of a particular state to deal with the elements of the transnational matter that affect it as criminality, with some of the activities being matters for its exclusive criminal jurisdiction while other terrorist acts may attract jurisdiction that is shared with other states. To be explicit, the fact that one state chooses to characterize acts of terrorism that affect it as armed conflict, whether international or non-international, does not preclude another state affected by terrorist acts of the same group or association of individuals from characterizing those acts as exclusively criminal in nature.

In trying to resolve these difficult issues we should consider carefully Yoram Dinstein's view that "the idea that a [non-international armed conflict] can be global in nature is oxymoronic; an armed conflict can be a [non-international armed conflict] and it can be global, but it cannot be both. Cross-border action against terrorists […] may be carried out as an 'extra-territorial law enforcement' operation."[173]

In summary, transnational violence by an organized armed group operating in more than one state either against other such groups within those states or against their respective governments must be assessed by reference to the nature and degree of violence that takes place in each state and by reference to the manner in which the violence is characterized by the government of each state. Accordingly, if the violence in a state involves an organized armed group, reaches the Common Article 3 threshold and if the government of the state characterizes the relevant events as amounting to a non-international armed conflict, the law of non-international armed conflict will apply. This is so despite the fact that activities of the same transnational terrorist organization in another state are countered by the authorities of that other state exclusively by application of law enforcement mechanisms. To interpret matters otherwise would deprive a state's authorities of the practical possibility to decide the status of the internal security activities in which it is engaged and would thus be likely to be interpreted as an unacceptable limitation on that state's sovereign rights.

[172] Haines 2012b, pp. 130–131.

[173] Dinstein 2012, p. 400. Yoram Dinstein then expresses his view that military operations in Afghanistan directed against Al-Qaeda terrorists blend into an ongoing international armed conflict in that country against the Taliban; Dinstein 2012.

2.8 Conclusion: An Emergent Legal Spectrum of Conflict

It is by no means clear that states will agree new treaty arrangements to adjust the spectrum of conflict in the manner mentioned in this chapter or for that matter in any other manner. The topic seems to arouse sensitivities and states seem to prefer to leave it well alone. If, as the author therefore assumes, there is unlikely to be specific conventional law provision on the matter during the foreseeable future, one might wonder whether any other way will be found to make appropriate adjustments in a formal way.

The answer is likely to be no. Article 1(4) of API will remain as a provision of conventional law so long as states do not amend the provision in accordance with Article 97 of API. We have identified good policy reasons why the distinction between Common Article 3 and APII non-international armed conflicts, or a distinction along similar lines, should remain. Any adjustment of the treaty criteria associated with that distinction would involve opening issues that states regard as sensitive, so the better policy approach would seem to be to allow those matters to remain as they are for the time being.

The distinction between armed conflicts, whether international or non-international, and events that fall short of armed conflicts seems to be grounded on a rational distinction that reflects the threshold of activities that states regard as legitimately matters for their exclusive, domestic jurisdictions. States seem unlikely to be willing to alter that distinction as currently understood and there seems to be no pressing need for them to do so.

The process of convergence of the law as it applies, respectively, in international and non-international armed conflict also seems set to continue, but is most unlikely to lead to identical legal provision.[174] Combatant status will remain a vital sticking point. The growing relevance of human rights law in relation to matters more traditionally viewed as the exclusive province of the law of armed conflict is, however, another factor relevant to the future legal spectrum of conflict. Human rights law may be expected to become of increasing importance in future years, particularly if the law of armed conflict is perceived to be underdeveloped, for example in relation to non-international armed conflict. Whether this would eventually have the effect of eroding the distinctions between the classes of conflict to which we have referred is to be doubted. Whether it causes states to update the law of armed conflict provisions by means of new treaty law remains to be seen.

It seems clear that the future will see a continuation of the trend for armed conflict to be complex, sometimes comprising different classes of conflict within

[174] Dieter Fleck concludes that "[t]here is an important trend in the law towards expanding the scope of application of the rules related to the conduct of hostilities originally contained only in the law of international armed conflict to situations of non-international armed conflict, while, at the same time, respecting the distinction which continues to exist in these two types of conflicts on matters of status of the fighters"; Fleck 2013, p. 592.

the territory of a single state. These complex situations will continue to pose challenges for Commanders and their legal advisers who will be concerned to prevail in the situation that confronts them while ensuring that action taken by deployed troops complies with whatever legal rules apply in the place and at the time in question.[175]

If formal, treaty adjustment to the spectrum of conflict seems unlikely, the obvious question to pose is whether it is likely, or indeed desirable, for some other approach to be undertaken with a view to addressing some of the matters discussed in this chapter. While it is of course open to states to declare individual national positions on these, and indeed on other, matters relating to international law, they are unlikely to do so in the present context, as even unilateral declarations may have the effect of opening up this sensitive issue to unwanted attention. Perhaps the better approach is to allow state practice, *opinion juris* and the decisions of international courts to adjust understanding of the legal spectrum to the extent necessary to meet modern requirements.

Finally, it is sensible to ponder whether the current appreciation will continue to apply, namely that the law of armed conflict has *lex specialis* status in relation to all events associated with an armed conflict to which that body of law is capable of being applied. To put the question another way, what will be the *lex specialis* in relation to each element in any new spectrum of conflict. Much will depend on the status of the conflict in question and on the nature of the particular activity to which the law is to be applied. While armed conflicts will generally provide the norms to be applied during an armed conflict, human rights law will certainly apply to certain activities undertaken in an armed conflict context. The relationship between human rights law and the law of armed conflict is, however, discussed in greater detail in Chaps. 9 and 10.

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API—Geneva protocol I additional to the Geneva conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, adopted in Geneva on 8 June 1977

[175] Consider for example the conflicts in Afghanistan from 2001 to 2013; see Hampson 2012, pp. 256–257.

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Chapter 3
International Manuals and International Law

Contents

3.1 Introduction

Does the proliferation of International Manuals in recent decades lead to the conclusion that experts, rather than states, are making international law and is that proliferation a bad thing? Those, in short, are the questions that this chapter seeks to address. In seeking to answer that question, we shall consider a number of relatively recent International Manuals. It should, however, be made immediately clear that a distinction for our purposes should be drawn between International Manuals, which are the subject of this chapter, and military manuals issued by a single state, or exceptionally by a small group of states, which are not. Briefly, an International Manual tends to be prepared by a group of experts working in their personal capacity and the text of the Manual, or at least the rules identified in the Manual, represent the collective and agreed view of the participating experts. National military manuals will tend to be prepared by individuals employed for that purpose by the relevant state and will be designed to express the view of the

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_3,

relevant state as to the rules of international law that bind it and as to how those rules should be interpreted.[1]

In June 1994, the International Institute of Humanitarian Law, San Remo, Italy published the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, a document that had been prepared by a Group of international lawyers and naval experts convened by the Institute for the purpose.[2] In 2004 the International Committee of the Red Cross (ICRC) published the results of its extensive and impressive study of the customary law that applies to the conduct of hostilities in armed conflict.[3] In February 2009 the ICRC also published its Interpretive Guidance on the Notion of Direct Participation in Hostilities.[4] This followed a 6 year series of meetings of Experts convened by the ICRC and by the Asser Institute. Then, in March 2010 Harvard University published its Manual on International Law Applicable to Air and Missile Warfare.[5] The document had been prepared by an International Group of Experts and presents a restatement of the law covering all aspects of the conduct of warfare in, from and to the air. In 2013, another International Group of Experts, this time convened by the Cooperative Cyber Defence Centre of Excellence (CCD COE) based in Tallinn, Estonia, produced the Tallinn Manual on the International Law of Cyber Warfare. All of this adds up to a great deal of collective international scholarship which raises some interesting international law issues which it is intended to consider in this chapter.

Before doing so, however, we should clarify exactly what is meant by "International Manual" as that term is employed in this chapter. It refers to any text, usually comprising black letter statements of law or rules published with an associated explanatory commentary, the whole or specified parts of which reflect the consensus view of the experts who, collectively, have prepared the text, or those parts on which they are agreed. It is to be distinguished from an edited volume or book the individual chapters of which will reflect the views of the contributing author and sometimes of the editor(s), but which will not necessarily reflect the opinions of all of the contributing authors.

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[1] National military manuals will represent state practice and may, therefore, contribute directly to the formation of customary law. By setting out the national interpretation of the rules of law that regulate the conduct of that state's armed forces in armed conflict, such a military manual will also disclose the rules that should be disseminated by the relevant state to members of its armed forces through programmes of military instruction in accordance with API, Article 83(1). For a discussion of military manuals and their importance in the law of armed conflict, see Hayashi 2010. For a discussion of the arguments for and against the preparation of a military manual for a group of states, see the discussion of the proposal for a Nordic Military Manual at ibid., pp. 195–197.

[2] The text is available, *inter alia*, on the ICRC Treaty database at www.icrc.org and is reprinted in Roberts and Guelff 2000, pp. 574–606.

[3] Henckaerts and Doswald-Beck 2005 (ICRC Study).

[4] Melzer 2009 (Interpretive Guidance).

[5] Program on Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare, published with a Commentary in March 2010 (AMW Manual).

Another thing should also be clarified, namely that the ICRC Customary Humanitarian Law Study and the ICRC Interpretive Guidance can and should be distinguished from the other documents discussed in this chapter, because neither is described as or designed to be a Manual as such. Both, however, can properly be described as the "teachings of the most highly qualified publicists", and it is on that basis that the author finds it convenient to consider them alongside the International Manuals.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the Swiss Government in 1974, conducted negotiations during the ensuing three years and, in 1977, adopted two Protocols additional to the Geneva Conventions.[6] Those Protocols address, *inter alia*, the conduct of hostilities respectively in international and non-international armed conflicts. The development of the international law relating to particular weapons is a distinct topic that was left to a different process leading to the adoption, in 1980, of a Convention dedicated to the regulation of conventional weaponry.[7] Since 1977, with the exception of certain provisions specifically applicable to particular types of weapon,[8] there has been no further development in treaty law relating to targeting. Moreover, the conventional targeting law that we have make no specific reference to certain new technologies that have materialized since the treaty rules were adopted. The drafting of API, for example, makes no reference to the outer space environment and in the haste to complete the work of the 1977 Diplomatic Conference, a somewhat reduced treaty text was adopted on non-international armed conflict, APII. The consequence, as this chapter will demonstrate, is that coverage of targeting in conventional law is, overall, rather less than complete.

In this chapter, we start by examining where the gaps in coverage by treaty law currently exist, and consider their significance. We then look at the International Manuals and other texts listed in the second paragraph, and ask what their status is in international law. Taking that status into account, we assess how they may influence future development of the law and ponder whether it is desirable that they should do so. Third we consider the early history of the international law of

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[6] Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (API) and Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977 (APII).

[7] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW), adopted 10 October 1980.

[8] Protocol III to CCW 1980, adopted on 10 October 1980, contains restrictions as to the air and ground delivery of incendiary weapons as defined in the Protocol. Protocol II to CCW 1980, also adopted on 10 October 1980, contains restrictions on the use of mines, booby-traps and other devices. Amended Protocol II to CCW 1980, adopted on 3 May 1996, contains more extensive restrictions on the use of the same three classes of munition. Protocols I and IV to CCW 1980 prohibit respectively certain fragmentation weapons and certain blinding laser weapons. These provisions are discussed in a little more detail in Chap. 5.

armed conflict, and question whether this process of Manual writing is necessarily something new, while fourthly and finally we seek to draw some conclusions.

3.2 Gaps in the Treaty Law of Targeting

That there are gaps in the treaty law relating to targeting is undeniable. Basic rules as to targeting in land operations are provided for in the Hague Regulations, 1907.[9] Though in most respects API's targeting rules make more specific provision, the Hague Regulations continue to have considerable legal importance, particularly for states that are not party to API. However, the 1907 text does not provide the same granularity of protection as is to be found in API. Moreover, arguably the Hague Regulations were written for a different age and the manner in which war is conducted has in the intervening century developed such as to render the rules somewhat dated.[10]

When adopted in 1977, API centred much of targeting law[11] on the notion of "attack", which it defined in terms of acts of violence against an adversary, whether in offence or defence.[12] The treaty regulation of military operations that do not constitute attacks is therefore limited to the generalized Article 48 statement of the principle of distinction, the similarly generalized but nonetheless important Article 57(1) obligation to take constant care, and to certain other general rules, for example as to the protection of the civilian population in Article 51(1).

To an extent the gap in treaty coverage of cyber targeting is narrowed if one adopts the Schmitt and Tallinn Manual approach, by characterizing cyber operations that cause death, injury, damage or destruction as "cyber attacks" and thus as subject to the targeting rules that regulate attacks in general. If this "violent consequences" approach were to be generally accepted by states in relation to cyber activities, it would seem logical to extend it beyond the confines of cyber operations to military operations involving other, as yet unknown technologies that have similar effects. Self-evidently, if states do not adopt such an approach there is the risk that the bulk of the detailed targeting rules in API will not be interpreted as applying to cyber operations having the stated effects, implying the existence of a substantial legal vacuum.[13]

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[9] Annex to Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907; consider Articles 22–35.

[10] For example, the Regulations contain no explicit prohibition of the targeting of civilians and do not address when civilians forego any protection to which general, including customary, law may entitle them.

[11] Certain provisions of the law of targeting do not presuppose an attack, for example the general principle of distinction as laid out in Article 48. So, for example, while general protection of the civilian population against the dangers arising from military operations is granted by Article 51(1), the specific protections are in respect of attacks and are specified in Article 51(2).

[12] API, Article 49(1).

[13] Consider, for example, the Chinese position on these matters as explained in Zhang 2012.

The section of API that deals with targeting applies to "any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. [It] further appl[ies] to all attacks from the sea or from the air against objectives on land but do[es] not otherwise affect the rules of international law applicable in armed conflict at sea or in the air".[14] It follows from this that the targeting rules in API do not affect land, air or sea warfare that cannot affect civilians or civilian objects on land but which can affect civilians or civilian objects in the air or at sea. Equally they do not affect the conduct of air-to-air combat.[15] Moreover, there has been no relevant development of the treaty law of targeting since 1977[16] and it is evident that the API targeting rules make no specific provision in relation to targeting in outer space. This significant environment is simply not mentioned in the treaty text.

The treaty law in relation to the conduct of maritime targeting is rather fragmented. The Paris Declaration[17] prohibited privateering[18] and addressed naval blockade.[19] Hague Convention III of 1899 was concerned with the protection of hospital ships and analogous vessels, of their personnel and of the wounded and shipwrecked.[20] Hague Convention VI of 1907 granted merchant vessels the right to leave an enemy port on the outbreak of hostilities and in related circumstances, restricting accordingly capture and confiscation rights.[21] Hague Convention VII of 1907 addressed the conversion of merchant vessels into warships[22] while Hague Convention VIII of 1907 regulated the use of automatic contact mines and

[14] API, Article 49(3).

[15] It should, for completeness, be noted that Article 49(4) of API provides that the API targeting rules are additional to the humanitarian protection rules in Geneva Convention IV and in other treaties and to other international law provisions protecting civilians and civilian objects at sea, on land or in the air from the effects of hostilities.

[16] Protocol III to the Conventional Weapons Convention did develop particular rules in relation to the use of incendiary weapons as defined in that treaty, and Protocol II and Amended Protocol II to the Conventional Weapons Convention contained particular rules in relation to the use of mines, booby-traps and other devices, again as those terms are defined in those treaties.

[17] Declaration Respecting Maritime Law, Paris, 16 April 1856 (Paris Declaration), a rule that has customary status, Heintschel von Heinegg 2013, p. 477.

[18] "Privateering is, and remains, abolished"; Article 1. Privateering consisted of the authorization by national authorities of private individuals or ships, through letters of marque, to attack enemy vessels during time of war.

[19] "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy"; Paris Declaration, Article 4.

[20] Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.

[21] Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, The Hague, 18 October 1907.

[22] Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907.

included provision as to the use of certain torpedoes.[23] For States that are party to AP1, the Hague Convention IX, 1907 rules in relation to littoral targeting have been overtaken by Article 49(3) of AP1. For states that are not party to API, the 1907 rules constitute the treaty law that regulates such activity. Those rules lack precision in certain respects[24] and may be regarded as somewhat out of date in certain other respects.[25] Hague Convention X of 1907 addressed hospital ships and sick wards on warships,[26] topics now covered in the Second Geneva Convention of 1949. Convention XI of 1907[27] contained some restrictions on the exercise of the right of capture and Convention XIII dealt with the application of the law of neutrality to naval operations.[28]

The 1936 London Procès-Verbal[29] implies, but does not explicitly provide, that submarines are not unlawful means of warfare and "are bound by the same principles and rules as surface ships".[30] It addresses the lawfulness of destroying or sinking merchant vessels under prize law.

Importantly, discussions that lasted from December 1908 to February 1909 produced a Declaration concerning the laws of naval warfare which, like the 1923 draft Hague Rules of Aerial Warfare,[31] was never formally adopted by states and thus never achieved treaty status. Similarly, the Manual of the Laws of Naval Warfare, prepared by a Commission and adopted by the Institute of International Law at its meeting in Oxford on 9 August 1913 did not have treaty status and has been overtaken by events to be discussed later in this chapter. API's targeting rules in Articles 48–67 apply to "sea warfare which may affect the civilian population, individual civilians or civilian objects on land" and to "all attacks from the sea […] against objectives on land, but do not otherwise affect the rules of international law applicable in armed conflict at sea […]".[32]

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[23] Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907, Article 1.

[24] Compare, for example, the precautions in attack provided for in Articles 1–7 of the Convention with those set forth in Article 57 of API and compare the modern notions of military objectives with the provisions in the same articles of the Convention.

[25] Consider for example the provision in Article 3 as to bombardment of listed undefended places following a refusal of requisitions.

[26] Articles 5–7, Hague Convention for the adaptation to Maritime Warfare of the Principles of the Geneva Convention, Convention X, The Hague, 18 October 1907.

[27] Convention XI Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval Warfare, The Hague, 18 October 1907.

[28] Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval Warfare, The Hague, 18 October 1907.

[29] Procès-verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22 1930 London, 6 November 1936.

[30] Roberts and Guelff 2000, p. 170.

[31] For a discussion of the status of the 1923 Hague Draft Rules, see Green 2008, pp. 45–47.

[32] API, Article 49(3).

So in relation to maritime warfare, we have a patchwork of somewhat dated treaty provision that, again, does not specifically address the capabilities of some modern weaponry and that is less than comprehensive, for example in relation to protection of civilians afloat.

It is also worthy of note that the early treaties were expressed to apply only "between contracting Powers, and then only if all the belligerents are parties to the Convention".[33] They did not therefore apply to non-international armed conflicts in which, self-evidently, there were parties to the conflict which by definition could not be parties to the relevant Convention. Equally, those early treaties did not apply if any state that was not party to the treaty participated in the armed conflict.

The most comprehensive treaty provision as to targeting in international armed conflicts is that contained in API. The treaty specifies its scope of application as the situations referred to in Article 2 common to the Geneva Conventions,[34] namely "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". States party to API will remain bound by its provisions *inter se* even though a State that is not party may be participating in the conflict, and will be bound by the Protocol as respects the non-party State to the extent that the latter accepts and applies the Protocol's provisions.[35]

A further point should also be made. The lacunae in treaty law that we have been discussing all relate to the employment of currently existing technologies in armed conflict. It is, however, clear that we are on the cusp of the introduction of new technologies none of which of course are mentioned in existing treaty law. Autonomous attack technologies, artificial intelligence and nanotechnology spring to mind as examples, but there are of course numerous other new technologies that are likely to be developed in the foreseeable future for use either as weapons or more generally in connection with hostilities. Some of these new technologies seem likely to expand the gaps in treaty law provision that we have already identified.

These gaps and deficiencies matter. They represent activities in connection with hostilities on which states have not negotiated legal provision. Customary law may, of course, fill a number of the gaps, but the complex network of sometimes obscure legal rules derived often from a broad selection of sources tends to present a complicated, sometimes confusing, legal picture which may be hard for those whose task it is to advise on such matters to access and interpret. A comprehensive exposition of the law relating to all hostile activities in a particular environment, be it sea, land, air, cyber or outer space, brings the relevant rules together into a single, structured volume thus making the law more accessible to legal advisers and others involved in the conduct of hostilities in that environment. If law is made more accessible to those whose task it is to abide by that law, it is probably more likely that the applicable law will be complied with. This certainly seems to be one

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[33] This language, by way of illustration, is taken from Hague Convention IV, 1907, Article 2.

[34] API, Article 1(3).

[35] Common Article 2(3) to the Geneva Conventions, 1949.

of the intended functions of the International Manuals on maritime, air and missile and cyber warfare that we will discuss in the next section. The gaps in treaty law to which we have referred remain important and in an ideal world they would be addressed by the negotiation among states of more comprehensive treaties covering each domain of warfare. At the time of writing, however, there seems to be no immediate prospect of such international law-making taking place.[36]

A second useful function that the International Manuals and the ICRC Customary Law study and Interpretive Guidance achieve is to articulate the customary law rules that, in the collective opinion of their authors, apply to the environments or circumstances addressed in the Manual or document. This will have the effect of clarifying where, in the authors' opinions, the gaps in legal, as opposed to treaty law, provision exist and will enable more informed judgments to be made as to whether additional legal provision is needed, as to the legal context in which any such additional provision would be made and as to the content that is required.

Some mention should, before the end of this section, be made of the Martens Clause.[37] This text, derived from the 1899 Hague Convention II and the 1907 Hague Convention IV, clarifies the relationship between customary law and treaty rules but should not be interpreted as providing legal rules of protection in its own right. It does, however, make the valuable point that activities in warfare, including those employing new technologies or methods of warfare, are not conducted in a total absence of law. The Clause does not, however, assert which specific legal rule applies in particular circumstances. That additional step is what the International Manuals, the ICRC Study[38] and the Interpretive Guidance seek to take.

3.3 What Status Do the Recent Manuals Claim?

In this section, we consider how a number of recent International Manuals came to be written, their general context and what their authors have written about their status or significance in defining the law that is the subject of each Manual. The available space does not permit a comprehensive treatment of the subject. Indeed,

[36] As Jeremy Marsh and Scott Glabe point out, state practice and *opinio juris* should be the primary sources informing the development of customary international law; Marsh and Glabe 2011, p. 14.

[37] See para 8 of the Preamble to Hague Convention IV, 1907: "Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

[38] Henckaerts and Doswald-Beck 2005.

some relevant Manuals are not addressed at all.[39] However, it is hoped that from the relatively brief discussion that follows some useful conclusions will emerge. Self-evidently, time following publication is needed for the text of an International Manual, of the ICRC Study or of the Interpretive Guidance to be reflected in state practice, such as military manuals and the manuals of individual armed forces. Inevitably, therefore, this process will be rather more advanced in the case of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, published as it was in 1994, than will be the case in relation to the more recent texts also discussed in this section. There have, however, been some academic critical appraisals of these texts and reference will be made to these in the following section where appropriate.

Before discussing individual manuals and texts, however, something should be said about the kind of process that leads to the production of such texts. There is nothing prescriptive about the following description, but in broad terms the production of an International Manual will involve the kinds of activity described here. In this regard, the author draws on his own experience as a member of the Groups of Experts associated, respectively, with the Air and Missile Warfare Manual, the Interpretation of the Notion of Direct Participation in Hostilities and the Tallinn Manual. The process begins with the convening of a group of individuals whose experience, as a group, will enable them adequately to address all relevant matters that are to be addressed. In plenary discussion, the Experts consider the matters that the proposed Manual will have to address and develop and set out in logical sequence a list of topics which they allocate among themselves. Each Expert will prepare a paper in academic, usually fully footnoted form addressing the topic(s) allocated to him or her. Each such paper will discuss all aspects of the topic discursively and will conclude with a draft "black letter rule" or rules.

At further plenary meetings, each Expert presents his or her paper which is discussed. Thereafter the paper and associated Rule(s) are refined, either by the Expert who prepared it or by other Experts, taking into account the points that were made during the plenary discussion. The revised paper and draft rules then go forward to the coordinators of the process. Further plenary discussion will tend to focus on the draft black letter rules with the aim of seeking to achieve wording on which the members of the Group of Experts are agreed. A Drafting Committee appointed from among the Experts will then prepare a Commentary to each of the black letter rules adopted by the plenary Group. The Commentary will be informed by the refined papers prepared by the Experts and by the discussions among the Experts as to the relevant topic. When the Commentary has been drafted, the complete text comprising black letter rules and Commentary is distributed to the Group of Experts for comment. Adjustments are made as necessary before the

[39] For example, the NIAC Manual 2006 published with Commentary in March 2006 and the San Remo Rules of Engagement Handbook 2009, published in November 2009 and available at www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook.

process is completed. It will be appreciated that this is a somewhat brief description of a process which will of necessity be adjusted in the light of the particular requirements of the particular Manual project. The aim throughout is to achieve maximum consensus among the Experts while seeking to ensure that divergences of opinion are properly reflected.

The Commentary text that, typically, accompanies each 'black letter rule', will fulfill a number of functions. It will explain the rule by setting forth the treaty or other authorities on which it is based. It will explain the established understanding of the treaty provision or relevant authority and will then show how the Experts came to the conclusion that the treaty provision or other authority can be applied in the circumstances that the Manual is addressing. Importantly, the Commentary will reveal matters relating to the rule on which the Experts were agreed, matters on which the Experts disagreed, and where there were majority and minority opinions, these will be set out in the Commentary text along with the reasoning supporting the competing views. It should be emphasized, however, that the texts of the black letter rules will have been adopted by consensus among all of the Experts.

Accordingly, anyone wanting to discover the matters of controversy that challenged the Experts should consult the Commentary. A careful reading of the Manual and of the accompanying Commentary will disclose to the reader the propositions of law found and agreed by the Experts, why they found those propositions, the meaning of each proposition derived from the discussions of the Experts during the Manual forming process and relevant aspects on which the Experts were not agreed.

We will now briefly consider in sequence some, but not all,[40] of the International Manuals and other texts to which this chapter is devoted.

3.3.1 San Remo Manual

The San Remo Manual in many ways typifies the matters with which this chapter is concerned. As we have noted, the treaty law applicable to naval operations, as it existed in 1994, largely comprised the 1856 Paris Declaration, the 1899 Hague Declaration III, the 1907 Hague Conventions VI to XIII inclusive, the 1936 London Procès-Verbal, the 1949 Geneva Convention II and certain provisions of Additional Protocol I. As Sir Adam Roberts and Richard Guelff explain,

> [t]he [San Remo] Manual is of particular significance because, notwithstanding the significant number of international agreements referred to above, in large part treaty law has not incorporated developments since 1907, and the last restatement of the law had been undertaken by the Institute of International Law in 1913.[41]

[40] We shall not, for example, consider the NIAC Manual 2006 and the San Remo Rules of Engagement Handbook 2009.

[41] Roberts and Guelff 2000, p. 573. Frits Kalshoven and Liesbeth Zegveld identify a number of factors that have contributed to this state of affairs, including that matters are much more

In an Introductory Note, the Manual's distinguished authors point out that the document was prepared by a group of legal and naval experts "participating in their personal capacity" in a series of Round Tables convened by the International Institute of Humanitarian Law. The Manual's declared purpose is "to provide a contemporary restatement of international law applicable to armed conflicts at sea". Addressing the degree to which the Manual's provisions may go beyond *lex lata*, the Introductory Note concedes "[t]he Manual includes a few provisions which might be considered progressive developments in the law but most of its provisions are considered to state the law which is currently applicable", from which we can deduce that, in the opinion of the experts, *lex ferenda* was the exception rather than the rule.[42] After noting the precedent of the Oxford Manual[43] to which among other texts we will refer below, the Introductory Note expresses the perceived need for the Manual in the following terms: "because of developments in the law since 1913 which for the most part have not been incorporated into recent treaty law". Additionally, as we saw in the previous section, there was no development in the conventional law generally applicable to maritime warfare equivalent to that in Additional Protocol I. Finally, it is evident from the Introductory Note[44] that while the Rules set out in the Manual were the product of the work and of the consensus among the experts as a whole, the related Explanation, or Commentary, was prepared by a core group of the experts.

The San Remo Manual text forms the basis of significant elements of the air and maritime chapters of Chaps. 12 (Air Operations) and 13 (Maritime Operations) of the UK Manual, forms the basis for much of Chap. 8 of the Canadian Joint Doctrine Manual on The Law of Armed Conflict at the Operational and Tactical Levels, dated 13 August 2001 and is reflected in Australian Defence Doctrine Publication 06.4 dated 11 May 2006. It is also heavily cited in Germany's Commander's Handbook, Legal Bases for the Operations of Naval Forces. Other national and armed force manuals that address maritime warfare will not necessarily cite the

(Footnote 41 continued)
complicated now than in the pre-UN era; that the sea is split into more areas; that the existence of the UN has affected the relevance of neutrality; and that techniques of warfare in, on and over the sea have changed radically. They also point out that relatively few states are actively involved in sea warfare and some of them may be reluctant to see the law relating thereto codified at a broadly composed international conference; Kalshoven and Zegveld 2011, p. 195.

[42] See, however, Hays Parks' discussion of the SRM Commentary's treatment of military objectives at Hays Parks 2006, pp. 100–101. Frits Kalshoven and Liesbeth Zegveld consider that "the authors of the document achieved the impressive feat of merging the traditional law of sea warfare with principles and rules taken from other areas of humanitarian law, working the whole into a set of realistic rules that should be acceptable to naval powers—and in effect have been adopted by several of these powers"; Kalshoven and Zegveld 2011, p. 198. See also Corn et al. 2012, p. 59.

[43] The Laws of War on Land, Oxford, 9 September 1880. Manual published by the Institute of International Law, Oxford.

[44] San Remo Manual on the International Law Applicable to Armed Conflicts at Sea, 1994, Introductory Note.

sources for their statements of law, but will, in the author's view, be considerably influenced by the San Remo Manual.

3.3.2 The ICRC Customary International Law Study (ICRC Study)

The 26th International Conference of the Red Cross and Red Crescent in Geneva in 1995 officially mandated the International Committee of the Red Cross to "prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts".[45]

A very considerable period of research was devoted to the assessment and evaluation of state practice and to the consideration of the element of *opinio juris*. A detailed methodology for the evaluation of the rules is set out in the Introduction to the Study, and it is neither necessary nor relevant to repeat that here. Of more significance to the present discussion is the process that was adopted. The ICRC consulted a group of academic experts in the field who formed a Steering Committee of the Study. The research was extensive and included national and international sources of state practice and the ICRC archives. Gathered practice was consolidated by six international research teams into the respective elements of the study. ICRC Researchers "edited, supplemented and updated" the consolidated practice which was to form Volume II of the Study Report.

International research teams produced executive summaries, on a preliminary basis, of the customary international humanitarian law that emerged from the collected practice. Consultations were then held first with the Steering Committee and then with a group of academic and governmental experts from all regions of the world who participated in their personal capacity. Thereafter, the Study's authors "re-examined the practice, reassessed the existence of custom, reviewed the formulation and the order of the rules, and drafted the commentaries". Comments from the ICRC Legal Division and from other experts were considered and a second draft was prepared which was put out for further academic and governmental expert comment in the light of which the text was finalized.[46]

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[45] Foreword to Henckaerts and Doswald-Beck 2005 by J Kellenberger, President of the International Committee of the Red Cross, p. x and Introduction p. xxvii. The Conference was endorsing a recommendation from the International Group of Experts for the Protection of War Victims who had met in Geneva in January 1995 and had recommended that the ICRC "be invited to prepare, with the assistance of experts in international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies".

[46] This account of the process is a heavily abbreviated version of the account in the Introduction to the Study, pp. xxv–xlix.

There is no doubt that a very great deal of scholarship was devoted to this major project, that a very extensive research process accumulated a substantial amount of state practice which was carefully examined and that relevant treaty law was given due weight and was considered in the context of other state practice. As the Introduction makes clear, *opinio juris* was also assessed with appropriate care and thoroughness.[47] As Dr. Jakob Kellenberger explains in the Foreword to the Study, "the idea [was] to capture the clearest possible "photograph" of customary international humanitarian law as it stands today".[48]

Nevertheless, as we shall see in the next section, the ICRC Study is not, as such, customary international law. Rather, it is, as we have seen, the product of a great deal of work by numerous eminent experts who were seeking to identify what customary international humanitarian law comprised in 2005, who recorded the evidence that they collected into Volume II of the study and who distilled the rules that they identified into volume I which also includes a commentary on each rule describing the basis for finding that rule. The ICRC Study is already being referred to extensively in International Manuals and will be cited and relied upon in state practice, for example in national military manuals, and in academic writings and other scholarship.[49]

As an aid to determining what customary law on the various aspects of international humanitarian law consists of and as a tool for states, jurists, scholars and for research, the ICRC Study is of inestimable value. However, in strict law it has the same legal status as all of the other writings of experts to which reference is made in this chapter,[50] and its conclusions can therefore legitimately be criticized by other commentators.[51]

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[47] Henckaerts and Doswald-Beck 2005, Introduction, pp. xxxix–xlix.

[48] Kellenberger 2005, p. xi.

[49] See for example Tallinn Manual, commentary accompanying Rule 26, para 10 and Commentary accompanying Rule 31, para 2.

[50] That is, it does not constitute one of the sources of international law listed under Article 38(1)(a) to (c) of the Statute of the International Court of Justice, but, as explained earlier in the present chapter, should be classified under Article 38(1)(d) as teachings of the most highly qualified publicists and, thus, is a subsidiary, but a most important, means for determining the existence and terms of rules of customary law.

[51] Consider for example Letter from J Bellinger III, Legal Adviser, US Dept of State and W J Haynes, General Counsel US Dept of Defense to Dr. J Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study dated 3 November 2006, available at http://www.icrc.org/eng/resources/documents/article/review/review-866-p443.htm. Note also the reply at Henckaerts 2007 and see also Wilmshurst and Breau 2007.

3.3.3 Direct Participation in Hostilities and the ICRC Interpretive Guidance

The process that led to the publication by the ICRC of the Interpretive Guidance[52] was somewhat different. A substantial group of experts, convened by the ICRC and the Asser Institute, discussed the issues surrounding the concept of direct participation in hostilities as that concept is reflected in treaty law. API refers to direct participation in hostilities as the activity which deprives a civilian of protected status under the law of armed conflict[53] whereas common Article 3 to the Geneva Conventions of 1949 refers to "active" participation. Correct understanding and application of the concept are important because a civilian who directly participates in the hostilities during armed conflict ceases to be entitled to protection from the effects of the hostilities and, instead, becomes a person whom the adverse party is entitled to target while such direct participation continues. The interpretation issue arose, however, because neither API nor common Article 3 defines what is regarded as amounting respectively to direct or active participation, terms which were taken to be largely synonymous. It was therefore felt that it would be helpful to seek to lend some granularity to the concepts for the assistance of States and of their armed forces.[54]

Unfortunately, although the Experts met on an annual basis from 2003 until 2008, there was in the end an absence of consensus among them on the important issues. The discussion at each of these meetings was structured and the objective throughout the process was to seek to achieve an interpretation of the notion about which the Experts could agree. Reports were prepared and circulated to participants after each of the meetings of the Experts. During the final meeting in December 2008, it being clear that consensus among the Group on the major issues could not be achieved, the Group was informed that the ICRC would issue Guidance on its own initiative. It should therefore be clearly understood that the Interpretive Guidance that the ICRC issued does not reflect any overall position agreed by the Experts. Rather, it represents the views of the ICRC.[55] While considerable scholarship, for which its author Nils Melzer is to be congratulated, went into the preparation of the Interpretive Guidance, the fact remains that it has attracted significant criticism.[56]

What the Interpretive Guidance seeks to do, as Dr. J Kellenberger, the then President of the ICRC, put it, was to explain the notion of direct participation in hostilities (DPH).[57] Further, its purpose was stated as to "provide recommendations

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[52] Melzer 2009.

[53] API, Article 51(3).

[54] Personal knowledge of the author who was a member of the Group of Experts from 2004 until 2008.

[55] Idem.

[56] See for example the special Forum in 42 NYU J Int L & Pol (Spring 2010) 637–916.

[57] Melzer 2009, Foreword, p. 5.

concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of" DPH. In bold script, the point is emphasized that the

> 10 recommendations made by the Interpretive Guidance, as well as the accompanying Commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.[58]

As noted earlier in the chapter, the Interpretive Guidance is not designed as a Manual, but in the author's view its legal status is similar to that of the International Manuals that are discussed in this chapter.

Clearly, there will be those such as academic students of international law who will note the terms of the debate on this vital topic, who will accordingly be well aware of the absence of expert consensus and who will therefore consider the statements made in the Interpretive Guidance in the context of that wider debate. Equally, there will be hard-pressed advisers of States who, knowing the ICRC's respected position in IHL, will tend to accept without question guidance that that institution chooses to issue ignorant, perhaps, of the diversity of, it is suggested, respectable and conflicting interpretations among informed commentators.[59] Nevertheless, the fact remains that the Interpretive Guidance is a fine piece of scholarship which deserves to be, and will be, widely cited and which will make a most valuable contribution in informing developing thinking on this most complex topic.[60]

While some of the disagreements about the DPH issue may have produced a little unwelcome heat, the point of greatest relevance to the present discussion is that the publication of the Interpretive Guidance did prompt a lively debate in the literature and there is undoubtedly a greater global understanding of the matters that are pertinent to making the assessment whether an individual is directly participating in hostilities than was the case before the DPH process was initiated in 2003.

The fact remains that states chose to adopt a notion in treaty law which they conspicuously failed to clarify, either at the time of adoption of the treaties or thereafter. Armed forces and their advisers require clarity if the law is to be respected and applied. This is not an academic issue. It is, rather, the basis on which members of the armed forces must decide whether an individual is a target or somebody they are obliged to protect. That is one of the most critical decisions made in war. While it is unfortunate that the Experts could not achieve consensus,

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[58] Melzer 2009, Introduction, p. 9.

[59] Note Marsh and Glabe 2011, pp. 18–24 where the influence of normative ICRC publications such as Melzer 2009, the Interpretive Guidance is noted and where the case is made for a United States response in which it sets out its national position, ideally in its forthcoming Law of War Manual, on these issues.

[60] See for example the endorsement of an approach taken in Melzer 2009, the Interpretive Guidance when the Tallinn experts considered the notion of organized armed groups "belonging to" a party to the conflict; Tallinn Manual, Commentary accompanying Rule 26, para 7.

it is undoubtedly the case that some guidance on the matter was crucially necessary, and in the absence of agreement among either states or experts, it was right that the ICRC should express its view.

3.3.4 HCPR Manual on the Law of Air and Missile Warfare[61]

The state of the international treaty law of air and missile warfare at the start of the twenty-first century can properly be described as somewhat fragmented and incomplete. In 1899, the Hague Peace Conference adopted Hague Declaration I which consisted of a prohibition on the launching of projectiles and explosives from balloons and other methods of a similar nature[62] but that provision only remained in effect for five years. A further Declaration was adopted in 1907 by the Second Hague Peace Conference[63] but this treaty was overtaken by subsequent technical developments in military aviation and by the adoption by numerous states of methods of aerial warfare that were in conflict with the treaty. In short, the Declaration was largely ignored.

There then followed a gap of some seventy years during which no significant treaty law was adopted to address the legal challenges posed by aerial bombardment, air to air and ground to air warfare.[64] This is despite the fact that such methods had been employed in numerous intervening conflicts such as both World Wars, the Spanish Civil War, the Korean War and the Vietnam War.[65] It is also in spite of the considerable anxiety that the whole notion of aerial bombardment caused, particularly in the early years of military aviation.[66] In 1923, the Commission of Jurists appointed by the Washington Conference did produce draft Rules of Aerial Warfare. As is well known, however, the draft Rules were never adopted by states and never, therefore, became a source of international law.

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[61] The following discussion is based on the personal knowledge of the author who was, from the inception of the Project to write the Manual, a member of the Group of Experts.

[62] Declaration (IV, I) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and other Methods of Similar Nature, The Hague, 29 July 1899.

[63] Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907.

[64] The Convention Relating to the Regulation of Aerial Navigation, Paris, 13 October 1919, prohibited the carriage of explosives, arms and munitions in international carriage (Article 26), a provision that also seems to have been largely ignored, and nothing useful came directly from the Washington Conference on the Limitation of Armaments of 1921–1922.

[65] See the account of air operations in both World Wars in Spaight 1947. See also Hays Parks 1990, pp. 63–64, and, for example, Hays Parks 1983, p. 3.

[66] See the discussion of attitudes to air warfare, and more particularly to air bombardment, in Spaight 1947, pp. 10–17.

Additional Protocol II addresses the law applicable in non-international armed conflicts but makes no explicit reference whatever to aerial warfare. Furthermore, no treaty law relating to the conduct of aerial operations during non-international armed conflicts has been adopted since 1977 with the result that all forms of aerial warfare during such conflicts remain entirely unregulated by conventional, that is treaty, law.

API, which concerns itself with international armed conflicts, does make some provision in relation to aerial warfare during such conflicts. We discussed the significance of Article 49 of API in Sect. 3.2. For the purposes of the present Section, it is important to recall that, because of the terms of Article 49, the targeting rules in Articles 48–67 of API do apply to any air warfare that may affect the civilian population, individual civilians or civilian objects on land. They also apply to all air attacks, that is acts of violence against the adversary whether in offence or defence,[67] against objects on land, whether the civilian population or civilian objects are affected or not. However, those targeting rules do not apply as a matter of treaty law to air operations against ground targets that do not amount to an act of violence, that is, that do not cause death, injury, damage or destruction. These conventional targeting rules also do not apply to air operations against maritime targets that will affect civilians or civilian objects at sea but not on land. Moreover, they do not apply to air to air combat during an international armed conflict.

The vital point is that certain air warfare activities that are not covered by these treaty rules are nevertheless addressed by customary law the precise terms of which will be a matter of appreciation, and it was against this background of insufficient and patchy treaty provision, differing participation in treaties as between states of importance and customary rules that may be the subject of differing interpretations that the Group of Experts convened in January 2004 at Harvard University to set about their task.

After subject headings that should be covered in the Manual had been identified and recorded, specific topics were allocated among the Experts, each of whom was tasked with preparing a fully annotated paper on the topic allocated to him or her. These papers were presented at, and debated within, plenary meetings of the Group of Experts. The draft papers were revised by each Expert to reflect the plenary discussion and it was on the basis of these revised drafts that black letter rules were formulated, which were adopted by consensus among the Group of Experts.

> Consensus for the purposes of the drafting of the black letter rules of the [AMW Manual] was understood to mean that no more than two participants in the Group of Experts had reservations about the language in which the Black-letter rules are couched (caveats were then inserted in the Commentary).[68]

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[67] Additional Protocol I, Article 49(1).

[68] AMW Manual, Introduction, p. 4. "In the rare instances in which compromise formulas proved beyond the reach of the Group of Experts, it was agreed to follow in the text the majority view but to give in the Commentary full exposure to the dissenting opinions."

So, where there was disagreement among the Experts this is reflected in the relevant part of the Commentary.

A Drafting Committee selected from among the Experts prepared a Commentary on each Rule. The Experts, all of whom contributed in their personal capacity, included members from a variety of states including the United States and from the ICRC.[69] A significant achievement of the Project was the agreement of Rules that covered certain matters of particular international law controversy that have precluded ratification by the US of API.

The process of development of the HPCR Manual on International Law Applicable to Air and Missile Warfare. The AMW Manual text saw frequent consultation with up to fifty states (indeed some States assisted with the financing of aspects of the Project), the acquiescence of the five Permanent Members of the UN Security Council and the resulting text was launched at NATO Brussels at an event at which states were represented.[70]

The AMW Manual does not have treaty status and is a restatement of the law applicable to air and missile operations.[71] Meetings between the Directors of the Project and states directly affected the content and scope of the resulting Manual. However, the purpose of the Manual is described in its Introduction as follows:

> The HCPR Manual does not have a binding force, but hopefully it will serve as a valuable resource for armed forces in the development of rules of engagement, the writing of domestic military manuals, the preparation of training courses – and – above all – the actual conduct of armed forces in combat operations.[72]

The AMW Manual was published relatively recently, in March 2010, so it remains to be seen to what extent it will be reflected in such state practice as military manuals of states, for example. It has, however, formed the basis of an international programme of legal education in the international law relating to air and missile warfare, has already been frequently cited in academic writing[73] and was cited by the Tallinn Manual Experts.[74]

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[69] See the description of the process in Kalshoven and Zegveld 2011, p. 199.

[70] Discussions between the author and Yoram Dinstein who was one of the two Co-Directors of the AMW Project and see Introduction to the AMW Manual, pp. 1–3.

[71] See AMW Manual, Introduction, p. 2: "The goal is… to present a methodical restatement of existing international law on air and missile warfare, based on the general practice of States accepted as law (*opinio juris*) and treaties in force. No attempt has been made to be innovative or to come up with a *lex ferenda* (however desirable this may appear to be); the sole aim has been to systematically capture in the text the *lex lata* as it is."

[72] AMW Manual, Introduction, p. 3.

[73] For a critical assessment of some of the definitions, for example as to "attack", and some of the rules, for example as to the loss of protection for civilians and civilian aircraft and as to terror attacks, see Paust 2012. For another assessment of the Manual, see Henderson 2010, p. 169.

[74] The Geneva Centre for Security Policy has run the legal education project and see for example Tallinn Manual, commentary accompanying Rule 26, paras 16 and 19.

3.3.5 *Tallinn Manual of the Law of Cyber Warfare*[75]

Cyber activity has attracted considerable public attention of late. This is due to a number of factors, including the general press coverage of the activities of hackers, police investigations of the activities of certain alleged hackers,[76] the legal processes and events reportedly associated with Julian Assange[77] and cyber operations undertaken against certain states that have had important consequences. In 2007 cyber operations targeted Estonia. On 27 and 28 April 2007, seemingly coordinated denial of service cyber operations affected Estonian websites during its dispute with Russia. Significantly, however, no formal determination was ever made as to which state, if any, had undertaken or sponsored those cyber operations.[78]

Then, on 19 July 2008, a computer located at a US ".com" Internet Protocol (IP) address was used remotely to take control of malware hosted on that computer, which initiated a Distributed Denial of Service (DDoS) operation against the website of the President of Georgia, causing the website to cease to operate for a period.[79] This was followed in August 2008 by a second wave of DDoS operations against Georgian websites. Arguably, however, it was the Stuxnet operation against Iranian centrifuges that caused the world to "sit up and take notice" of the potential that cyber operations offer in the context of armed conflict. The cyber operation involved using an integrated set of components, known as "stuxnet", to prosecute a cyber attack in July 2010, thereby reportedly damaging centrifuges employed in connection with the Iranian nuclear programme.[80]

While there is discussion about the need for new international law to address the challenges posed by this new environment of military operations,[81] namely cyberspace, to achieve a new treaty on the subject would require consensus among

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[75] Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual), 2013.

[76] See for example the press reporting of the announcement by the UK Director of Public Prosecutions that legal proceedings will not be taken against Garry McKinnon in respect of alleged hacking activities; consider also the high profile extradition proceedings against the same person; as to the former, see www.bbc.co.uk/news/uk-20730627 dated 14 December 2012 and as to the latter see the announcement on 16 October 2012 to the UK House of Commons by Home Secretary Teresa May reported at www.bbc.co.uk/news/uk-19962844.

[77] See Wikileaks founder Julian Assange to fight Extradition at the Supreme Court, Daily Telegraph, 1 February 2012, available at www.telegraph.co.uk/news/worldnews/wikileaks/9053399/Wikileaks-founder-Julian-Assange-to-fight-extradition-at-Supreme-Court.html.

[78] Owens et al. 2009, pp. 173–176.

[79] Markoff 2008 at http://bits.blogs.nytimes.com/2008/08/11/georgia-takes-a-beating-in-the-cyberwar-with-russia/. Consider also operations against Kyrgyzstan in 2009; Hunker 2010, p. 3.

[80] It is understood that these reports of damage have not been confirmed by Iran. See, however, Fildes 2010 at www.bbc.co.uk/news/technology-11388018 and Broad, Markoff and Sanger 2011.

[81] Westby 2013.

a sufficiently numerous group of nations as to numerous critical issues, which may include some or all of the following:

- the need for new treaty law;
- the cyber activities that respectively should and should not be addressed;
- specifically and respectively what constitutes an unlawful use of cyber force, a cyber armed attack and a cyber attack in the *jus in bello* sense;
- the categories of person and object that should be permitted to participate in cyber operations during periods of armed conflict;
- the categories of person and of object that should be protected from the effects of cyber operations during periods of armed conflict;
- the general types of legal rule that are required, for example as to deception operations and as to precautions in attack and against the effects of attacks; and
- the detail of how new rules should be expressed.

However, much activity by states in the cyber field is sensitive from a security perspective and it is likely therefore that states will be reluctant to do anything that may disclose either their perceived vulnerabilities in this field or their assumed advantages over other states in general and over potential opponents in particular. There being no existing treaty law that makes specific provision in respect of cyber warfare, it would therefore seem that new treaty law on this subject is likely to take a long time to materialize.

In 2009, a small group of international law and technical experts met at the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia at the invitation of that Centre to discuss whether a Manual should be written addressing the law applicable to cyber warfare, an activity which at that time, and indeed at the time of writing, was regarded as being in its early infancy. The decision was made to proceed with a project to write such a Manual, and in 2013 the Tallinn Manual was published.

The project brought together "distinguished international law practitioners and scholars in an effort to examine how extant legal norms applied to this "new" form of warfare".[82] The Expert-driven process was designed "to produce a non-binding document applying existing law to cyber warfare".[83] The core questions to be addressed were whether the existing body of international law applies at all to cyber warfare, and if so, how.[84] So the Project was launched to bring some clarity to the complex legal issues surrounding cyber operations, and the Experts set themselves the challenging task of addressing both *jus ad bellum* and *jus in bello* aspects.

Having unanimously agreed that both the *jus ad bellum* and the *jus in bello* apply to cyber operations, the task of the International Group of Experts became to judge how they apply and whether there are any cyber-unique considerations.

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[82] Tallinn Manual, Introduction, p. 1.

[83] Tallinn Manual, Introduction, p. 1.

[84] Tallinn Manual, Introduction, p. 3.

The basis on which the Manual was written is set out clearly and succinctly as follows: "The Rules set forth in the *Tallinn Manual* accordingly reflect consensus among the Experts as to the applicable *lex lata*, that is, the law currently governing cyber conflict. It does not set forth *lex ferenda,* best practice, or preferred policy."[85]

As to the identification of rules, the process was that

> [t]he Rules were adopted employing the principle of consensus within the International Group of Experts. All participating experts agreed that, as formulated, the Rules replicate customary international law, unless expressly noted otherwise. It must be acknowledged that at times members of the Group argued for a more restrictive or permissive standard than that eventually agreed upon. The Rule that emerged from these deliberations contains text regarding which it was possible to achieve consensus.[86]

As to the status of the Commentary, again the author can do no better than to cite the explanation in the Introduction as follows:

> The Commentary accompanying each Rule is intended to identify its legal basis, explain its normative content, address practical implications in the cyber context, and set forth differing positions as to scope or interpretation. Of particular note, the International Group of Experts assiduously sought to capture all reasonable positions for inclusion in the *Tallinn Manual*'s Commentary. As neither treaty application nor State practice is well developed in this field, the Group considered it of the utmost importance to articulate all competing views fully and fairly for consideration by users of the Manual.[87]

As the Tallinn Manual was only published in April 2013, it is too early to assess its overall impact on the literature,[88] academic thought and state practice. It is to be hoped, however, that it will be of practical assistance to all of those constituencies and to others.

3.4 What Status in Law Do These Documents Actually Have?

It is legitimate for students of international law to wonder what the status of these International Manuals, of the ICRC Customary Humanitarian Law study and of the Interpretive Guidance is in international law. Are they law in their own right, that is, are they sources of the law? If not, are they evidence of what the law is?

The authoritative approach to determining the sources of international law is set out in the Statute of the International Court of Justice as follows:

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[85] Tallinn Manual, Introduction, p. 5.

[86] Tallinn Manual, Introduction, p. 6.

[87] Tallinn Manual, Introduction, p. 6.

[88] Consider, however, Fleck 2013, p. 331; Heller 2013; and Healey 2013.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[89]

So paras (a) and (b) list respectively treaty law and customary law as sources of international law. Clearly, the writings of experts do not have the status of treaty law. Treaties are defined as any written international agreement between two or more states contained in one or more related instruments and governed by international law.[90] The title given to a document does not determine its status as a treaty and any one of a number of descriptors may be employed including treaty, convention, protocol, regulations, declaration and statute. But the writings of experts do not come within the definition and are not therefore treaties.

So that conclusion leads us inexorably to wonder whether these writings of experts might be customary law. Custom, or customary law, represents what states in general do, or refrain from doing, believing that the law obliges them to act in that way, or, as the case may be, to refrain from acting contrary to the customary rule.[91] As noted above, Article 38(1)(c) of the ICJ Statute refers to international custom "as evidence of a general practice accepted as law", and it seems proper to conclude that "accepted" here means accepted by states. The writings of experts are not, in themselves, state practice, particularly as, usually, the Experts are acting in their personal capacity and are explicitly not therefore binding states in what they say or write.[92]

Because the legal propositions set out in the International Manuals, in the ICRC Customary Law Study and in the Interpretive Guidance were prepared by Experts writing in their personal capacity and do not therefore constitute state practice, they do not contribute directly to the generation of customary law. The Rules set

[89] Statute of the International Court of Justice, San Francisco, 26 June 1945, Article 38(1). The Statute is annexed to the Charter of the United Nations, of which it forms a part.

[90] Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1969, defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[91] The UK Manual 2004, paras 1.12 and 1.12.1, notes that customary international law consists of the rules which as a result of state practice over a period of time have become accepted as legally binding. Such a rule is created by widespread state practice coupled with a belief on the part of the state concerned that international law obliges it, or gives it a right, to act in a particular way.

[92] Consider in this regard the account of the writings of ancient yet eminent publicists given by Gary Solis, who refers among others to Francisco de Vitoria, Pierino Belli, Balthazar Ayala, Hugo Grotius, Alberico Gentili, Emmerich de Vattel, Lassa Oppenheim and, as a corporate publicist, to the International Committee of the Red Cross; Solis 2011, pp. 17–20.

out in the Manuals and in the Guidance may well reflect what the expert authors considered customary law to be on the relevant points. The rules set out in the ICRC Customary Law Study explicitly sets out what the ICRC considers customary law to be on the matters discussed in the Study, and the commentary to each of the rules in that Study summarises the state practice on which the authors of the Study base the suggested customary law rule. There is, however, a fine yet important distinction between, first, the substance of customary law, and, second, documents expressing expert opinion as to the form and contents of customary law or developing rules based on such an opinion. In the author's view, the International Manuals, ICRC Study and Interpretive Guidance fall into the second category, not the first.

The reference in Article 38(1)(c) of the ICJ Statute to general principles of law does not particularly assist us in relation to the International Manuals the Study and the Interpretive Guidance. Significantly, however, the reference in para (d) to the teachings of publicists providing subsidiary, or secondary, means of determining a rule of law rather accords with the way in which the authors of the various International Manuals and of the Interpretive Guidance themselves describe their texts. The Manuals are not sources per se of international law. Rather, they reflect what, in the opinions of the contributing experts, the law on the particular matter constitutes. As Yoran Dinstein observes, the restatements of law in such Manuals "may at times be perceived as accurate replicas of customary international law, and even in their innovative parts may influence the general practice of States or pave the road for future treaties".[93] Of course, the interpretations set forth in International Manuals, for all that they reflect the considered opinion of global experts in the field, can be accepted or rejected by States, courts, tribunals and others. In short, there is a vital distinction to be borne in mind between what the law comprises on the one hand, and the writings of informed commentators, individually or in groups, as to what they believe the law to be.

3.5 Do These Manuals Have Utility and Should They Influence the Development of Law?

As we have seen, the International Manuals seek to reflect, either exclusively or predominantly, extant law. Where there is treaty law that is sufficiently widely accepted, it will have formed the starting point for the development of the rules put forward in the text of the relevant Manual. Customary law principles and rules will also have been examined by the Experts to determine whether they have application to the circumstances that are being addressed in that part of the Manual. By determining in this way whether, and if so how, accepted customary norms apply to new circumstances, the International Manuals serve a useful purpose. The opinion

[93] Dinstein 2010, p. 17.

of the Experts as a whole that a particular proposition is a rule of customary law is of utmost importance in providing a secure basis for finding the rules that, as a matter of accepted law, bind all States as to the matters discussed in the Manual. It is this audit trail, as it were, linking widely accepted customary law and sufficiently widely accepted treaty law to the Manual text that is the vital intellectual ingredient which establishes the reliability, accuracy and broad acceptance of the Manual itself. The Experts of course have no interest in producing a text that is not accepted globally. The constant concern, therefore, is to ensure that the texts of each Rule and of the associated Commentary are legally and textually absolutely correct, and that all respectable views on the matter are properly reflected.

A most useful function that the International Manuals achieve is of articulating the relevant customary law rules that, in the opinion of the experts, apply to the activities that are being discussed in the Manual. They can demonstrate, for example, that the absence of ad hoc treaty law on a particular topic does not necessarily mean an absence of applicable international law. Showing that, for example, certain new methods of warfare are not undertaken in a legal vacuum is, it is suggested, to the benefit of states, which are, by means of the Manual, able to access what subject matter experts consider to be the applicable rules, set out in convenient form with an accompanying explanation in the form of the Commentary. It also benefits victims whose protected status is explained in a clearer manner than might otherwise be the case; combatants will find it easier to determine the "do's and don'ts" and scholars will be assisted in their research of these matters. In short, the International Manuals fill an apparent, but not always real, space in legal coverage that might, absent the Manuals, cause incorrect appreciations as to the applicable law to be reached as a result of the lack of accessible treaty provision or the fragmented state of such law. In doing so, they supply a sound basis for legal advice to commanders and others.

A process of taking customary principles and rules that may have evolved in the context of other domains or spheres of military activity and simply applying them to the domain that is the subject of the Manual without adequate reflection would risk the drawing of erroneous conclusions. Nevertheless, the customary principles, such as the principles of distinction, discrimination, proportionality, humanity and military necessity will apply as currently understood across the full range of combat environments, old and new. There was, for example, no controversy whatever among the Experts preparing the Tallinn Manual as to the applicability of the principle of distinction to cyber operations.[94] It is always, however, going to be necessary to consider whether customary rules necessarily apply in the context being considered, and any conclusion in that respect must be based on a careful analysis of the relevant circumstances and considerations.[95]

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[94] Personal knowledge of the author who participated in all relevant discussions.

[95] The experience of the author in relation to the Air and Missile Warfare and Tallinn Manuals is that this thought process was indeed carried through with care in both cases and is reflected in the Commentaries to the relevant Rules.

The Martens Clause[96] acknowledged the view of the negotiators of the 1907 Declarations and Conventions that they were not making comprehensive arrangements that would cover all circumstances that might foreseeably arise in armed conflict. The repetition of that clause in API indicates a similar appreciation in relation to that instrument, a conclusion that is borne out by the international treaty law "gap analysis" that we undertook earlier in this chapter. The principles referred to in the Martens Clause do not, however, "constitute additional standards for judging the legality of means or methods of warfare"[97] and caution is therefore required before seeking to argue for the existence of a specific customary rule exclusively based on those principles applied to new technological circumstances.

Nevertheless, in the author's view, customary legal rules will generally apply to new methods of warfare. Indeed, it cannot be doubted that the principles of distinction and discrimination, the rule of proportionality and the rules as to precautions in attack and against the effects of attacks are of general application across the spectrum of methods of warfare, both new and old. The International Manuals are therefore, it is suggested, on safe ground when they apply these principles and rules to the particular environment, and they serve a valuable purpose in indicating to the busy operational lawyer how the generic rules can be interpreted and implemented in the sorts of circumstance that are liable to arise in the kind of warfare the Manual is discussing. By showing that there are few legal vacuums, they helpfully reinforce the point that all military operations must be conducted in accordance with the law.

So do the International Manuals have an indirect effect on the formation of customary law? Indeed they would seem to, but only to the extent that their proposed rules are actually followed by the armed forces of states and, thus, are translated into state practice. To the extent that this occurs, a law-forming process may be initiated or inspired by provision in an International Manual, perhaps in circumstances where states were unable, or perhaps disinclined, to achieve agreement as to a treaty text. It is for the reader to form his or her own view, but there would seem to be considerable value in such a process, where subject matter experts, operating independently of state pressures, produce a clinically objective assessment of what the law is and in which states can either implement the suggested rules in their own practice, or reject or ignore them. These Manuals and their proposed rules can also, as we have seen, be criticized in the academic literature. The point is that, as noted in the ICJ Statute, the Manuals are not a primary source and states will therefore always have the final say as to what the law actually is, or becomes.

Similarly, if treaty law were to be considered on a topic previously addressed in an International Manual, it is clear that the contents of the Manual would be considered by states when deliberating on the nature and extent of the treaty

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[96] See n. 37 above and accompanying text and see somewhat similar sentiments in API, Article 1(2).

[97] Dinstein 2010, p. 9, citing Greenwood 2008, pp. 34–35.

provision that is to be made. Those states may of course choose to adopt in the treaty text a similar approach to that taken in the International Manual, or they may decide to proceed differently. The utility of a relevant International Manual in that context is that it will acquaint the participating states at an early stage with the opinions of subject matter experts as to the law applicable to the circumstances they are to discuss, but there can be no certainty that the Manual's provisions will have any particular influence on such a treaty discussion.[98]

3.6 Are the Manuals Making New Law or Restating Existing Law?

To a degree we have already considered this issue. As we have seen the International Manuals generally profess to be restating *lex lata*, that is existing law. The conclusion that that is in fact the case is supported, for example, by the faithful reflection of, for example, numerous provisions of the San Remo Manual in certain Military Manuals of states.[99] The repetition of the International Manual's Rules in such Military Manuals is of course the most direct manner whereby the propositions in the International Manual can be turned into state practice. The preparedness of states to reflect the International Manual's propositions in the national Military Manual may also be indicative that the International Manual's text is indeed accurately reflecting existing customary law. There is something of a virtuous circle at work here.

The possibility cannot be excluded, perhaps, that where limited elements of *lex ferenda* creep into the International Manual's text, states also adopt them in their national interpretations. Were this to occur, it would perhaps be characterized by some as the experts leading the states "by the nose". Nevertheless, that would seem to be the exception rather than the rule, and where it does occur, it would not seem to be such a bad thing anyway.

It is worth repeating that most of these International Manuals state that, in the opinion of their distinguished authors, they are restating the law[100] although some manuals acknowledge, as we have seen, some limited but not necessarily specified development of the law. The experts involved in these processes do, to a degree,

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[98] As authoritative commentators have observed, "these soft law projects likely will influence the development of the LOAC, particularly if cited by courts or governments seeking to identify applicable legal rules. Soft law can become the basis of future treaties…In the future, it can be expected that States may want to look first to the results of soft law projects on emerging LOAC issues…to determine what future rules might look like before engaging diplomatically on the creation of "hard" law, such as treaties"; Corn et al. 2012, p. 60.

[99] See for example the UK Manual 2004, Chaps. 12 and 13.

[100] This is explicitly the position in relation to the ICRC Customary Law Study, see the Foreword to the Study by Dr. A. G. Koroma, Judge at the International Court of Justice, Henckaerts and Doswald-Beck 2005, p. xiii.

stake their collective reputations on the texts that they produce. Academic evaluation following publication may be expected to identify any Manual text that is considered to depart from the asserted *lex lata* limitation. It is of course self-evident that a Manual that truly is a restatement and nothing more is not developing the law at all, but simply setting out the existing law in a form which is likely to be of more use to those operating in the relevant domain. It is difficult to see how a process of that sort can be the subject of any legitimate criticism by anyone.

Criticism may, however, be legitimate if such a Manual process were to develop the law while pretending that it had not done so, or if the Manual were to include *lex ferenda* and acknowledge as much without specifying which of its statements fall into that category. Statements of a *lex ferenda* nature that acknowledge that status are, obviously, nothing more than a statement of the opinion of the experts, an opinion that, as with the rest of the text, states are at liberty to accept or reject as they see fit.

Perhaps the author is too much of a traditionalist, but it would seem that it always has been, and remains, for states to make international law either through their practice, supported by *opinio juris,* or through the adoption of treaties negotiated by them. The opinions of experts can have considerable value in that context, whether as a means of reflecting the law that states have already made, or as a way of showing which gaps in treaty law exist and require to be addressed by States.

The experts have the opportunity to evaluate the complex legal issues that confront them in an objective, legally thorough way. By having experts assess and report on the existing law that applies to the activity in question, an informed baseline is established against which proper judgments can be made as to the adequacy of existing law, the need for new law, the precise topics it should cover and the form it should take. It is clearly desirable that any future process for the development of new treaty law should be informed by as accurate an assessment as possible of the relevant law as it currently exists; and for as long as no such new treaty law is made, the Manual provides the accurate baseline as to what existing law provides.

So the preparation of these International Manuals can be regarded as a positive development. There seems to be no basis for contending that the international community of states is being sleep-walked into the adoption of a body of law that will have damaging consequences. Rather the failure in recent decades of states to address in treaty form the law applicable in numerous particular circumstances to armed conflict hostilities renders it highly desirable that such Manuals be prepared for the assistance of all those who have rights and duties under that law. But is this process of Manual writing something so very new? In the next section, we look at the experience of the nineteenth and early twentieth centuries.

3.7 Is This International Manual Process Something New?

It can be argued that the Lieber Code[101] was a national military manual rather than an International Manual of the sort that we have been discussing. It was, after all, described as the work of a single author and was prepared for use by the Union side during the American Civil War. But it is worth mentioning in the context of the current chapter because of its scholarship, evident authority and context, if for no other reason. Dr. Francis Lieber, an academic at Columbia University, prepared the Code. It is an extensive document which set out Dr. Lieber's appreciation of the law of war as it then stood. As has been observed, it informed the content of numerous other national manuals "and it prepared the way for the calling of the 1874 Brussels Conference and the two Hague Peace Conferences of 1899 and 1907".[102]

Delegates from fifteen European States met in Brussels on 27 July 1874 to consider a Russian draft agreement on the laws and customs of war. An amended version of the document was adopted but was not ratified by States. As the ICRC has commented, "[t]he project nevertheless formed an important step in the movement for the codification of the laws of war".[103] The text of the Project was examined by a committee appointed by the Institute of International Law. Then, in 1880, the Manual of the Laws and Customs of War was adopted in Oxford. The significance of these Brussels and Oxford documents lies primarily in the evident linkage that one sees between the draft provisions that they contain and some of the actual texts adopted by States in the Declarations and Conventions of 1899 and 1907. Indeed, one can trace the evolution of numerous important legal ideas from 1863 until 1907 leading to the tentative conclusion that it was the international law experts of the day whose efforts did much to inspire the law subsequently adopted by States.

We referred in Sect. 3.3.4, during the discussion of the AMW Manual, to the 1923 draft Hague Rules of Aerial Warfare. A student of the development of the law of armed conflict is bound to be struck by the way in which numerous of the concepts proposed by the authors of the draft Rules later found developed expression in specific provisions of API.[104] So here again it can be argued that it was the writings of the experts that developed the thinking which was later, in the case of API much later, incorporated in developed form into law through the adoption of a treaty.

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[101] Instructions for the Government of Armies of the United States in the Field, 24 April 1863.

[102] Roberts and Guelff 2000, p. 13.

[103] Introduction to Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874, at www.icrc.org.

[104] Consider for example the relationship between Article 24(3) of the 1923 Rules, second sentence, and Article 51(4) of API, first sentence, or between Article 24(1) of the 1923 Rules and Article 52(1) and (2) of API.

3.8 Conclusion

Those great and eminent publicists, Adam Roberts and Richard Guelff, having noted that the writings of legal specialists have frequently been cited as evidence of where the law stands on particular issues, comment as follows:

> Despite the fact that formal codifications of the law are now much more numerous and extensive than they were, for example, at the time of the Second World War, the general importance of such writings has not thereby decreased. Indeed, it has perhaps increased owing to the evident need to clarify the greater number of codified provisions, to relate the provisions of the various codifications to each other and to other sources of law, and to consider how the law applies to new situations and new technical developments.[105]

If that was true in the year 2000, it is doubly true in 2013. While the publicists of the 19th century arguably pointed the way for the treaty negotiators of 1899 and 1907 and while the experts of 1923 seem to have inspired, however indirectly, the treaty writing of 1977, the International Manual writers of the present day cannot know when or if their labours will inform the deliberations of states at the negotiating table at some future date. They can, however, be sure that absent treaty provision, the rules and commentaries that they prepare will clarify the law and its appropriate method of application for those who must work with it, often in difficult circumstances. Moreover, Ken Watkin does, perhaps, make a valid point when he observes that "it is difficult to see how States can complain about new […] manuals of rules if they do not become more strategically and fully engaged in the processes that are being used to clarify the law".[106]

The author would argue that experts who clarify these often complex matters through careful analysis and thought, presenting their conclusions in a coherent accessible form, must be of great assistance to those who have the task of applying the law. By making the law more intelligible and accessible, the Manual authors increase the likelihood that it will be understood and applied, and any process that improves the application of the law has to be a good thing. A careful review of the texts of such Manuals will reveal to states, and other readers, where gaps in current legal provision exist and will therefore assist states and others to decide whether initiatives to develop the law are called for and, if so, the matters that should form the subject of such development and the legal context in which the preparation of new law would take place.

Where there is no treaty law on a particular subject, the International Manual will record what, in the collective opinion of the Experts, the applicable customary rule, if any, consists of. It will therefore articulate the detail of customary law and the circumstances in which it applies.

The author therefore agrees with Yoram Dinstein that "[w]hen the international community is unable to craft new binding law, it is indispensable to try to produce,

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[105] Roberts and Guelff 2000, p. 12.

[106] Watkin 2012, p. 10.

at the very least, unofficial restatements of those segments of [the law of international armed conflict] that are more than usually blighted by gaps and question marks".[107] That is the difficult task that the authors of these International Manuals set themselves and, at a time when states are wary of re-examining and updating the law, the International Manuals that have so far emerged provide valuable assistance to legal advisers and operators as to the current state of the law in the field of activity covered by the Manual and set forth a useful framework against which any inadequacy in the law can sensibly be assessed and addressed.

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[107] Dinstein 2010, p. 296.

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Chapter 4
Interacting Technologies and Legal Challenge

Contents

4.1 Introduction

There is a tendency for the discussion as to the legal implications of new technologies in armed conflict to focus on a particular technology in isolation. Indeed, this has been the approach that the author has adopted in the past when discussing, for example, the legal implications of autonomous unmanned technologies in the future battlespace.[1] Taking such an approach ignores, however, the potentiality for the interaction of new technologies with one another to pose additional legal challenges. Having considered the law as it applies to each of three novel technologies in isolation, we will explore how interaction between them may raise additional legal issues.

[1] Boothby 2011 and Boothby 2012, pp. 275–290.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_4,

The technologies that we will discuss are, respectively, the use of unmanned platforms, including to conduct attacks both with a 'man in the loop' and using automated or autonomous attack technologies, the employment of cyber methods of warfare and the development of artificial intelligence. In the second section of the chapter, the characteristics of such unmanned attack techniques, the legal challenges they pose and how the law of armed conflict will constrain their employment will be explored. In the third section, we address cyber operations, how the law of armed conflict applies to them and how certain types of cyber operation using or against unmanned platforms may generate legal issues. In the fourth section, we weave artificial learning intelligence into the picture, working out what exactly it comprises, how it might be used, and how it might affect the legal assessment of the unmanned attack/cyber warfare issues that we discussed in the previous section. In the fifth and final section, we will draw some conclusions.

While much of the following discussion will refer to aircraft and air operations, it should be noted that robotic technologies are increasingly being developed also for use in the land, maritime and cyber environments.[2]

Before embarking on this discussion, however, it is important that we understand the breadth of activities that unmanned platforms are destined to undertake in the future. In the Foreword to the Strategic Defence and Security Review, the Prime Minister and Deputy Prime Minister assert: "The fast jet fleet will be complemented by a growing fleet of Unmanned Air Vehicles in both combat and reconnaissance roles"[3] A blend of motives seems to drive this trend, including potential reductions in force structures, a reduced requirement for airframes and, more generally, the expected ability to deliver new or enhanced capability at reduced cost and reduced threat to personnel.[4] UK Ministry of Defence doctrine summarizes the tasks for unmanned aircraft systems as dull, dirty, dangerous and deep, suggesting that these adjectives cover a range of potential roles including

[2] For an outline of US unmanned ground vehicle and maritime capabilities see Akerson 2013, pp. 66–68. See also Peter Singer's description of the use of the PackBot robot in counter-IED operations and the use of the TALON and SWORDS robots and of the MARCBOT robot that scouts for enemies and searches under vehicles; Singer 2011, pp. 333–336. For an assessment of how numerous states are organized to address cyber-security, whether they have military command or doctrine of cyber activities and whether they have or plan to acquire offensive cyber capabilities, see Lewis and Timlin 2011.

[3] Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review, UK Government, p. 5, available at www.official-documents.gov.uk/. The UK Ministry of Defence Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems dated 30 March 2011 (JDN 2/11) issued by the UK Development Concepts and Doctrine Centre (DCDC), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33711/20110505JDN_211_UAS_v2U.pdf, para 102 is unambiguous: "There is a general expectation across defence, academia and industry that unmanned aircraft will become more prevalent, eventually taking over most or all of the tasks currently undertaken by manned systems". Consider also Arkin 2009, pp. 7–27 and Krishnan 2009, pp. 27–30.

[4] JDN 2/11 at para 103, but note that technical complexity and reportedly substantial operational and training losses of unmanned airframes may erode the financial advantage; JDN 2/11, para 106, and see Gulam and Lee 2006, p. 126.

repetitive intelligence, surveillance and reconnaissance patrols, detection of chemical, biological and/or radiological substances, dangerous missions in which risking aircrew is considered inappropriate and observation and attack of targets at long range located deep within enemy-controlled territory.[5] Clearly, the relaxation of design constraints consequent on the absence of a pilot from the cockpit, significantly greater endurance and, thus, persistence over target areas, reduced unit cost and improved access possibilities, particularly for smaller unmanned platforms, may also render the unmanned option attractive. Technology demonstration in the UK has included the Taranis and Mantis programmes[6] and unmanned aircraft vary dramatically in size from platforms the size of conventional aircraft, to small aircraft with wingspans measured in centimetres.[7]

The literature refers to 'robots' and to 'robotics', the former of which Peter Singer described as

> [m]achines that are built upon what researchers call the 'sense-think-act' paradigm. That is, they are man-made devices with three key components: 'sensors' that monitor the environment and detect changes in it, 'processors' or 'artificial intelligence' that decides how to respond and 'effectors' that act on the environment in a manner that reflects the decisions, creating some sort of change in the world around a robot. When these three parts act together, a robot gains the functionality of an artificial organism.[8]

4.2 Remotely Piloted Aircraft

The UK Future Air and Space Operating Concept defines remotely piloted air systems as systems directly controlled by a human operator, and classes autonomous or highly automated systems as unmanned. This chapter gives a similar

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[5] JDN 2/11, paras 307–311.

[6] Taranis explores the issues raised by combining low observable technology with an unmanned system associated with an airframe the size of a conventional trainer aircraft while Mantis looks at intelligence and situational awareness provision using an unmanned airframe. Mantis could also carry a range of weapons. Zephyr is a battery powered very long endurance industrial initiative.

[7] See for example the US Defense Advanced Research Projects Agency Nano Air Vehicle programme. The remotely controlled military aircraft has a 16 centimetre wingspan, weighs 19 grammes and relays real-time video imagery from an on-board camera; details are available at www.darpa.mil/NewsEvents/Releases/2011/11/24.aspx.

[8] Singer 2009, p. 167. As Richard O'Meara comments, robots are simply more efficient than humans; "Their sensors, for example, can gather infinitely more information than humans; their processors can make sense of that information by tapping into multiple information streams and databanks at a faster rate than humans; and their effectors can unleash appropriate responses to that information more efficiently than humans. Further, they don't carry with them the baggage of human frailty"; O'Meara 2012 and available at www.amoon.ca/Roboethics/wiki/the-open-roboethics-initiative/military-robotics/.

meaning to remotely piloted systems but them seeks to subdivide JCN 3/12's unmanned systems in order to explore the legal issues involved.[9]

It was in 2002 that an attack took place in Yemen that constitutes, arguably, the start of the modern era in unmanned attack from the air.[10] The US targeted Qaed Senyan al-Harthi[11] by means of a Predator remotely piloted aircraft equipped with a Hellfire missile. During the twelve years thereafter, such unmanned aerial attack operations have come to be used on a frequent basis, with squadrons being specially formed to undertake them[12] and with increasing numbers of States acquiring the technology.[13] Moreover, and somewhat worryingly, the technology has also started to get into the hands of non-State armed groups.[14]

Remotely piloted aircraft (RPA)[15] are now evidently seen as the weapon of choice[16] in their anti-insurgency role and indeed in many other roles.[17] That is, for example, made clear in the US Department of Defense Unmanned Systems Integrated Road Map 2011 to 2036.[18] So, unsurprisingly and as we shall see in due course, the HPCR Manual on the Law of Air and Missile Warfare (AMW Manual) reflected these advances in the conduct of air operations.

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[9] The UK Future Air and Space Operating Concept, JCN 3/12, issued by DCDC on 5 September 2012 (JCN 3/12) at para 102.

[10] As to the historical evolution of such technologies, see Singer 2009, pp. 46–65 and Krishnan 2009, pp. 13–32.

[11] See Dworkin 2002 available at www.crimesofwar.org/onnews/news-yemen.html.

[12] Note for example, 39 Squadron Royal Air Force which has, since 2007, been equipped with the MQ-9 Reaper Remotely Piloted Aircraft; see the announcement on 13 May 2011 of the formation of 13 Squadron to control the use of Reaper remotely piloted aircraft from RAF Waddington, available at www.gov.uk/government/news/raf-announces-new-reaper-squadron. Consider also Mapping US drone and Islamic militant attacks in Pakistan, BBC News, 22 July 2010, available at: www.bbc.co.uk/news/world-south-asia-10648909 and the increased US reliance on unmanned capabilities such as that afforded by the Predator UCAV; Predator Drones and Unmanned Aerial Vehicles, New York Times, 13 March 2013. See also Casey-Maslen 2012, pp. 598–600.

[13] See for example the International Institute of Strategic Studies' assessment of the stocks of 'drones' held by 11 States reported in Drones by Country: Who has all the UAVs, The Guardian, 3 August 2012 available at www.guardian.co.uk/news/datablog/2012/aug/03/drone-stocks-by-country.

[14] Iran says Hezbollah drone sent into Israel proves its capabilities, Reuters, 14 December 2012 available at www.reuters.com/article/2012/10/14/us-lebanon-israel-drone-iran-idUSBRE89D09N20121014.

[15] 'Remotely piloted aircraft' is the term preferred in UK joint doctrine to describe an aircraft that, whilst it does not carry a human operator, is flown remotely by a pilot, is normally recoverable, and can carry a lethal or non-lethal payload; JDN 2/11, para 203.

[16] For an account of some of the occasions when the US has used unmanned combat aerial vehicles to undertake attacks during the last 10 years, see O'Connell 2011, pp. 1–8; Blackhurst 2012, p. 26; Martin and Sasser 2010. Consider press coverage of such operations, for example Markoff 2010, A1; Drew 2010, p. A6; Mayer 2009, p. 36.

[17] See for example Martin and Sasser 2010.

[18] US DoD-Unmanned Systems Integrated Road Map, FY 2011-2036 11-S-3613, available at http://publicintelligence.net/dod-unmanned-systems-integrated-roadmap-fy2011-2036/ (US DoD Road Map). See also the United States Air Force Unmanned Aircraft Systems Flight Plan 2009 to 2047.

An RPA controller will frequently exercise control of his platform from a location that is distant from the place where the RPA is being flown. Indeed, the operator's ground station may well be in a different country or even in a different continent from the theatre of operations.[19] The RPA operator's task is to pilot the RPA using remote guidance technology, to monitor the sensors that will usually give dynamic information as to the territory over which the machine is being flown, to locate and detect persons and objects that are of interest and decide whether, and if so when and how, any attack is to be undertaken using the RPA. Unlike the pilot of a manned aircraft, there may be other analysts in relative proximity to the RPA controller in a position to assist with targeting and related decision-making. It is, however, critically important that all those involved in these decisions take all required precautions. It is vital that they exercise an appropriately high degree of care when doing so. The principles of distinction, discrimination and proportionality must be complied with.[20] In addition, the manning and technical arrangements under which such operations are conducted must be conducive to ensuring respect for, and compliance with, these legal principles and rules that are applicable to all targeting operations.

Some observers have raised ethical concerns about such methods of attack.[21] However, the law of armed conflict contains no specific treaty or customary law provision either prohibiting or restricting the circumstances in which RPA technology may be used in attack.[22] As Tony Rogers observes, "[t]here is nothing special in the law of war about the use of drones to deliver missiles. Their use in armed conflict is governed by the normal rules on military objectives, precautions in attack, proportionality, perfidy and persons *hors de combat*".[23] The acquisition and use of RPA technology is subject to the general principles and rules of weapons law in the law of armed conflict,[24] and to the treaty[25] and customary law rules relating to targeting.[26]

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[19] Wagner 2013, pp. 103–104 and for a description of a remotely piloted aircraft operator's role, see Byrne 2013, p. D4.

[20] See Casey-Maslen 2012, pp. 606–616 and note Stefan Oeter's assessment that unmanned aerial vehicles and unmanned combat aerial vehicles must be remotely controlled and piloted; Oeter 2013, pp. 180–184.

[21] See the comments attributed to Lord Bingham in which a parallel was drawn between drones, as he referred to them, and landmines or cluster munitions: "It may be, I'm not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used"; Unmanned drones could be banned, says senior judge, Daily Telegraph, 6 July 2009, available at www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html.

[22] Wagner 2011, p. EAP4.

[23] Rogers 2012, pp. 52–53 citing Melzer 2008, p. 419.

[24] These rules are outlined and discussed in Chap. 5.

[25] See, e.g., API, Articles 48–67.

[26] See, for example, ICRC Customary Law Study, rules 1–45.

Yoram Dinstein correctly notes that the law of armed conflict does not prohibit the targeted killing of individual enemy combatants if certain rules are complied with such as the proportionality rule and the rule prohibiting treacherous or perfidious killing.[27] Gary Solis also excludes the targeted engagement of members of the enemy armed forces from his notion of 'targeted killing'.[28] He identifies five requirements for targeted killing as he employs that term, namely that an international or non-international armed conflict must be in progress; second, the victim must be a specified individual targeted by reason of his activities in relation to the armed conflict; third, the individual must be beyond a reasonable possibility of arrest; fourth, only a senior military commander or senior domestic government official representing the targeting state may authorize a targeted killing; and fifth the targeted individual must be directly participating in the hostilities either as a continuous combat function or as a spontaneous unorganized act.[29] Further discussion of the targeted killing issue lies outside the intended focus of this chapter. For a comprehensive analysis, the reader is referred to Nils Melzer's seminal treatise on the topic.[30]

Alan Backstrom and Ian Henderson discuss the notion of opening fire in self defence of an unmanned platform, contending, correctly, that this may be legally problematic (if self defence is the only legal basis for the particular use of force). If, however, force is used against an unmanned platform during and in connection with an armed conflict, force may be used, by the unmanned platform or otherwise, in response.[31]

As we shall see in Chap. 5, a legal review of a new RPA system, whether conducted under Article 36 of API[32] or under the corresponding customary rule,[33] will apply the existing principles and rules of weapons law as the yardstick[34] against which the lawfulness of the new RPA system will be assessed.[35]

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[27] Dinstein 2010, pp. 103–104. As to direct participation by civilians in hostilities, see Chap. 7 below and Solis 2010, pp. 543–546.

[28] Solis 2010, pp. 538–539.

[29] Solis 2010, pp. 542–543.

[30] Melzer 2008.

[31] Consider Backstrom and Henderson 2012, p. 498.

[32] For the API obligation to undertake weapons reviews, see the discussion at Chap. 5.

[33] See for example Tallinn Manual, rule 48(a) which provides that all states are required to ensure that the cyber means of warfare that they acquire or use comply with the rules of the law of armed conflict that bind the state.

[34] Consider for example Lazarski 2001, available at www.airpower.maxwell.af.mil/airchronicles; Stewart 2011, p. 271; and Boothby 2011.

[35] For a thorough analysis of the law as it applied to the attack on Anwar al-Awlaqi by US drone attack in Yemen on 30 September 2011, see Thorp 2011, available at www.parliament.uk/briefing-papers/SN06165. Controversies exist, of course, as to the employment of such technologies to prosecute the 'war on terror', in particular with regard to operations in Pakistani airspace by the CIA. Those controversies seem to have more to do with whether the Pakistani authorities consent to the air operations in question, and thus have to do with the body of law that applies to the attacks and to those who undertake them. See Lubell 2012, pp. 433–434. In relation to drone strikes in Yemen, consider Miller 2012. These consent issues, however, lie outside the

The sensors, screens and other data at his disposal place the RPA controller in an analogous but not identical position to the pilot of a manned aircraft. The debate as to the competing operational advantages between manned and unmanned attack platforms is peripheral to the issues with which this chapter is concerned. The point of legal importance is that in certain particular circumstances 'eyeballing' the target, i.e. direct observation of the target by a pilot on-board the platform, may provide additional information for example as to the presence of civilians, but that frequently this will not be the case and RPA systems will usually provide the operator with sufficient information to enable attacks to be undertaken in compliance with the discrimination rule.[36] However, and there is an important caveat to emphasize here, weapons may not necessarily perform in accordance with the design specification, for example because of inadequate technical specification, design flaws or poor manufacturing quality control. Proper testing and evaluation of the weapon throughout the procurement process are critically important in order to ensure that it will perform the intended military task in accordance with applicable law, notably the principles of distinction, discrimination and the precautions rules.[37] Where, however, direct human observation of the target is, in the particular circumstances, essential to ensure that the attack complies with the discrimination rule, a manned platform will have to be employed.

4.3 Automation and Autonomy Distinguished

Having discussed RPAs, our focus should now shift to the foreseeable developments in unmanned attack methods that will see autonomous attack technology brought to the battlespace.[38] Automated and autonomous attack technologies are

(Footnote 35 continued)
intended scope of this chapter and will not therefore be discussed further. As to the human rights law aspects of drone strikes, see Casey Maslen 2012, pp. 616–623 and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston 2010, paras 85–86.

[36] This is a reference to the rule in Article 51(4) of API prohibiting indiscriminate attacks and to the examples of such attacks in Article 51(5).

[37] From a discussion of these matters that includes the engineering perspective, see Backstrom and Henderson 2012, pp. 507–510.

[38] See for example US DoD Road Map, n. 18 above, p. vi: "DoD must continue to pursue technologies and policies that produce a higher degree of autonomy to reduce the manpower burden and reliance on full-time high speed communications links while also reducing decision loop cycle time' . For systems with autonomous features already in use, consider the maritime Phalanx system in service with the Royal Navy and described at www.royalnavy.mod.uk/The-Fleet/Ships/Weapons-Systems/Phalanx; the United States Navy MK 15 - Phalanx Close-In Weapons System, described at www.navy.mil/navydata/fact_display.asp?cid=2100&tid=487&ct=2; the Russian Arena-E Active Protection System; the Mutual Active Protection System; Eschel 2011, available at www.defense-update.com/20110112_maps.html and South Korean border security arrangements discussed in South Korea deploys robot capable of killing intruders along border with north, Daily Telegraph, 13 July 2010 available at www.telegraph.co.uk/news/

liable to be developed in relation to all environments, including cyberspace, but much of the ensuing discussion will tend to focus on its application in airspace. While the introduction of unmanned aircraft employing autonomous technology in attack may, in the view of some commentators, be a decade or more away,[39] it is already sensible to consider these developments and their legal implications in particular. As Kenneth Anderson and Matthew Waxman point out, automation will become an increasing feature in other aspects of everyday life, and it is to be expected that this developing reality will contribute to the formation of future attitudes to its use in the battlespace.[40] Furthermore, it is clear that platforms will need to manoeuver with increasing rapidity and flexibility and that weapon systems will need to be activated with such speed as, respectively, can only be achieved by mechanical controls and decision-making processes. In short, it will become increasingly advantageous to remove pilots from fast jet cockpits.[41] Peter Singer identifies a number of advantages that robots possess as compared to humans, including that they save lives; do not experience fear; do not forget orders; do not have emotional responses; are well suited to dull, dangerous and dirty tasks; do not require rest to the same degree; have shareable intelligence and can compute and act at digital speed.[42]

Care is required in the terminology that is employed here. There is an important distinction to be drawn between automation and autonomy. An automated system is one which, in response to inputs from one or more sensors, is programmed logically to follow a pre-defined set of rules to provide an outcome.[43] Knowing the rules under which it operates renders the outcome predictable. As Jakob Kellenberger explained, an automated system is not remotely controlled, but functions in a self-contained and independent manner once deployed. It will independently verify or detect a particular type of target object and then fire or

(Footnote 38 continued)
worldnews/asia/southkorea/7887217/South-Korea-deploys-robot-capable-of-killing-intruders-along-border-with-North.html. See also Sharkey 2011 and Liu 2012, pp. 633–634.

[39] Quintana 2008, available at www.rusi.org/downloads/assets/RUSI_ethics.pdf.

[40] Anderson and Waxman 2013, available at www.hoover.org/taskforces/national-security, pp. 2–3. Consider, perhaps as an example of automation, the data fusion systems that are increasingly to be found in combat aircraft in which data from diverse sensors is fused for presentation to the operating aircrew, with a view to alleviating cockpit workload, for example on such systems as Typhoon/Eurofighter; see for example Eurofighter Technical Guide dated 2009 and available at www.eurofighter.com/fileadmin/web_data/downloads/misc/EFTechGuideENG-1109.pdf.

[41] Anderson and Waxman 2013, p. 5 and footnote 16.

[42] Singer 2011, pp. 337–340.

[43] Markus Wagner differentiates automated and remotely operated systems by noting that the former "do not involve a human operator during the actual deployment but rather the necessary data is fed into the system prior to deployment of the system". He cites the WW2 V-1 and V-2 rockets, automated sentry guns and sensor-fused ammunition as examples of automated weapon systems; Wagner 2013, pp. 104–105.

detonate.[44] Alan Backstrom and Ian Henderson explain that automated weapons are nothing new, citing mines and booby-traps as examples.[45]

Contrast an autonomous system which, from an understanding of higher level intent and direction and with an awareness of its environment, is able to take appropriate action to bring about a desired state. The significant element in autonomy is the ability of the system to decide a course of action from a number of alternatives without depending on human oversight and control. While its overall activity will be predictable, individual actions may not be.[46] So, "[w]hat distinguishes their functioning is the ability to independently operate, identify and engage targets without being programmed to target a specific object". While there is still some human involvement in advance of the sortie, for example refuelling and arming, "[d]ecisions about which targets to engage and how and when to conduct an attack would be left to the software which, ideally, has been programmed in such a manner as to address a myriad of situations and a changing set of circumstances".[47] In the ICRC's view, the development of a truly autonomous weapon system that can implement international humanitarian law represents a monumental programming challenge that may well prove impossible, a conclusion which may prove to be accurate for the reasons given in this chapter.[48]

Alan Backstrom and Ian Henderson discuss autonomy by reference to weapons that can loiter, search for and identify targets, attack the target and report the point of weapon impact. They discuss the Wide Area Search Autonomous Attack Miniature Munition, a small cruise missile with a loiter capability that can search for a specific target. On acquisition, it will either attack or seek permission to do so. As those authors note, "most of the engineering aspects of such a weapon are likely to be achievable in the next twenty-five years" but "the 'autonomous' part of the weapon still poses significant engineering issues". They clearly support the ICRC view by commenting: "It would seem beyond current technology to make the complicated assessments required to determine whether or not a particular attack

[44] Kellenberger 2011, p. 5.

[45] Backstrom and Henderson 2012, pp. 488–490.

[46] JDN2/11 para 205. See also Wagner 2012, available at http://robots.law.miami.edu/wp-content/uploads/2012/01/Wagner_Dehumanization_of_international_humanitarian_law.pdf, p. 12, where it is noted that while there will be some human involvement, e.g. fuelling and arming, what distinguishes the functioning of a truly autonomous system is its ability to operate independently and to engage targets without being programmed to specifically target an individual object. Critical is the ability to react independently to changing circumstances. Markus Wagner describes autonomy in this regard as "an unmanned system that prosecutes an attack based on a code that enables an independent (i.e. not predetermined) decision-making process without direct human input. This includes the detection and targeting as well as the firing decision, wholly independent from immediate human intervention"; Wagner 2011, p. EAP5. See also Kellenberger 2011, p. 5.

[47] Wagner 2013, p. 105. For a somewhat broader interpretation of autonomy, see Bolt 2013, pp. 126–131.

[48] ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 40.

would be lawful if there is an expectation of collateral damage".[49] While Backstrom and Henderson discuss the possibility of the robot learning from humans as a way of overcoming the problems associated with qualitative judgments, it must of course be borne in mind that human judgments on these matters are fallible. Accordingly, careful thought needs to be given to the legal and ethical acceptability of any approach to this problem that involves programming an offensive weapon system on the basis of human decision making that may have proved unreliable.

Degrees of automation vary depending on the number of functions that are automated. The self-awareness of autonomous systems seems to require that they must be capable of having the same level of situational understanding as a human, an achievement that is not yet, as we have seen, technically achievable. From a doctrinal perspective, 'so long as it can be shown that the system logically follows a set of rules or instructions and is not capable of human levels of situational understanding, then they should only be considered automated".[50] Contrast, however, Peter Asaro's interpretation of an autonomous weapon system as "any system that is capable of targeting and initiating the use of potentially lethal force without direct human supervision and direct human involvement in lethal decision-making". This would appear potentially to include under the 'autonomous' heading a number of systems that in doctrinal terms would likely be regarded as 'automated'. It is clearly important that a more coherent, precise and more broadly accepted taxonomy be developed in this field[51] so that the discourse can proceed on surer foundations.

Applying the approach based on national doctrine, an unmanned aircraft is part of an automated system if it is pre-programmed to proceed to a set location and there to fire a weapon (example 1). Also 'automated' according to the doctrine we have considered is an unmanned aircraft that is programmed to fly to a pre-set location and thereafter to search a defined area of territory looking for predetermined objects which, when found and recognized using on-board image recognition technology, it simply attacks (example 2).

Contrast example 3, which is a system that is a variation of example 2. The unmanned aircraft uses on-board algorithm-based or other sensor systems to locate and recognize specified objects or even persons that the machine has been instructed to attack. The machine is, however, programmed to make certain evaluations, or decisions or to undertake certain procedures before it can then decide to undertake the attack. It is these obligatory evaluations, decisions or procedures that, in doctrinal terms, would mark out this kind of system as autonomous, because they constitute a genuinely mechanical decision-making process that goes beyond simple recognition.[52]

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[49] Backstrom and Henderson 2012, pp. 491 and 493–494.

[50] JDN 2/11, para 206(b).

[51] See Asaro 2012, p. 690.

[52] Kenneth Anderson and Matthew Waxman take the view that "genuine autonomy in weapons will probably remain rare for the foreseeable future and driven by special factors such as reaction speeds and the tempo of particular kinds of operations"; Anderson and Waxman 2013, p. 2.

The United States approach, as reflected in a recent Department of Defense Directive,[53] considers a weapon system to be autonomous if, once activated, it 'can select and engage targets without further intervention by a human operator'. This definition seems to class a much wider selection of technologies as 'autonomous'; it does, however, place the legal issue that needs to be discussed in usefully sharp relief and will therefore be used as the basis for the ensuing discussion.

To be clear, for the purposes of the remainder of this chapter weapons are considered to be autonomous if the machine decides upon the particular person or object that is to be attacked. The fact that it may use algorithm-based or similar technologies to recognize an object or person as belonging to the class or type that it has been instructed or programmed to attack does not, for the purposes of this discussion, preclude the weapon system being classed as autonomous. In practice, as Kenneth Anderson and Matthew Waxman have suggested, the path towards what they describe as 'genuine autonomy' is likely to be incremental, with progressive implementation of degrees of automation of different functions of the platform.[54] The legally significant issue of, arguably, most immediate concern is whether autonomous unmanned aircraft systems, as that term is being used in the remainder of this chapter, that are used to undertake attacks are capable of complying with the international law rules that regulate targeting.

As we shall see in due course,[55] the weapons reviews prescribed by Article 36 of API and by customary law require the assessment of new weapon systems to be undertaken by reference to existing legal norms. These existing legal rules will therefore determine the legal acceptability of new automated and autonomous attack weapons systems and must therefore constitute the criteria against which decisions are made as to fielding of such technologies. While there is no legal obligation on states to disclose their weapons reviews, Kenneth Anderson and Matthew Waxman rightly draw attention to the benefits that may emerge from international engagement at the best practice level linked to the weapons review process and with a view to the resulting international dialogue developing common ethical standards and legal interpretations.[56]

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[53] US Department of Defense Directive 3000.09, Autonomy in Weapon Systems 13, 21 November 2012.

[54] See the explanation at Anderson and Waxman 2013, pp. 5–8. Mike Schmitt and Jeffrey Thurnher take the view that at least for the foreseeable future, autonomous weapon systems will only attack targets meeting pre-determined criteria and will function within an area of operations set by human operators; Schmitt and Thurnher 2013, p. 241.

[55] See Chap. 5.

[56] Anderson and Waxman 2013, p. 4.

4.4 Autonomy in Attack and International Law

So how does autonomy in attack match up to contemporary law of armed conflict norms? Discussion has, to date, focused on whether such methods of attack can be adopted consistently with the proper application of the precautionary rules set out in Article 57 of API. Whether such attacks can be undertaken in accordance with the principle of distinction is going to depend, in practice, on the technical performance of the recognition technology and will require, in the case of autonomous systems, that in the case of doubt as to certain matters an attack shall be aborted.[57] The weapon system either will or will not be capable of discriminating between the military objects[58] it is designed to recognize and other, civilian, objects that are not military objectives.[59] Peter Asaro rightly notes the requirement to test newly designed autonomous weapon systems to verify whether they meet the requirements of international law, as reflected in Article 36 of API, and expresses the view that, due to the complexity of these systems, this will be a difficulty.[60]

Autonomous attack of combatants and/or of civilians directly participating in hostilities raises, of course, potentially even greater challenges in relation to the principle of distinction and the discrimination rule.[61] It is not at present clear whether technology will be devised that distinguishes particular individual combatants, for example by means of iris recognition techniques, whether the focus will, instead, be on detecting some other characteristic deemed to be peculiar to combatants, such as their metallic footprint[62] or whether some entirely different science will be employed.[63] Whatever the method, and assuming that in battlefield

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[57] Wagner 2013, p. 113.

[58] The reference here to objects as opposed to objectives is deliberate. The algorithm technology is likely to be configured so as to distinguish, for example, between an artillery piece or a tank on the one hand and a civilian vehicle of comparable size on the other; see, e.g., Lewis et al. 2009, p. 10 and see Wagner 2011, p. EAP7.

[59] Markus Wagner acknowledges that a number of weapons are today capable of determining a target's military nature; Wagner 2012, p. 25.

[60] Asaro 2012, pp. 692–693.

[61] JDN 2/11, para 508. For an assessment of future development of maritime autonomous capabilities, see Mackenzie et al. 2012, available at www.aviationweek.com/Article.aspx?id=/article-xml/AW_10_15_2012_p04-500687.xml, but note currently available autonomous maritime weapons such as the Sting Ray Mod 1 torpedo described at http://www.baesystems.com/product/BAES.

[62] If nanotechnological developments in weapons manufacture result in the development of military firearms with reduced metal content, such a target recognition technology may, depending on its methodology, become even more problematic.

[63] Consider for example one concept, the Adversary Behavior Acquisition, Collection, Understanding and Summarization facility, which integrates data from a number of sources and would apply a human behaviour modelling and simulation engine to generate intent-based threat assessments associated with individuals and groups; Schachtman 2011, available at www.wired.com/dangerroom/2011/09/drones-never-forget-a-face/. As David Akerson points out, the purpose is to automate the process of identifying the enemy; Akerson 2013, p. 69.

conditions it will in practice satisfactorily achieve the required distinction, which is a decidedly major assumption, it will also be necessary to demonstrate that in undertaking an attack, the software can determine whether the targeted individual is *hors de combat* or otherwise protected from attack and that, if that is the case, it will refrain from undertaking the attack.

API, Article 41(1) provides: "A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack". It would not seem to be a realistic interpretation of the 'should be recognized' language to argue that, because the attacker is using technology that is incapable of making such a recognition, it cannot be said that the person ought to have been so recognized. The better interpretation is that if more conventional and generally available methods of attack would permit such recognition, the 'should have been recognized' criterion is made out, such that if the autonomous system nevertheless proceeds with the attack, the rule is broken. In this regard, it should be recalled that a person who clearly expresses an intention to surrender or who has been rendered unconscious or is otherwise incapacitated by wounds or sickness and therefore unable to defend himself is regarded at law as being *hors de combat* provided that he abstains from any hostile act and does not attempt to escape.[64]

The precautions obligations in Article 57 of API, however, go rather wider than the requirement in subparagraph (2)(a)(i) to do everything feasible to verify the status of the object of attack as a lawful target or as not being subject to special protection. Everything feasible must also be done to determine whether it is prohibited by the Protocol to attack the intended target. This will involve a determination whether the attack will breach the discrimination rule in Article 51(4) of API. An example of an indiscriminate attack would be one which treats "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects".[65] The technological challenges that this provision poses for those developing autonomous attack technologies are how to enable the machine to evaluate the relative positions of the military objectives in order to determine whether they are in fact 'clearly separate and distinct', an inherently relative concept, and how to evaluate the similarity or otherwise of the concentration of military objectives in a locality with the concentration of civilians or civilian objects there. Making these determinations involves comparing what may be fundamentally dissimilar phenomena. While a machine can perhaps be developed that simply counts objects that it may be able to put into the respective categories of military objective and civilian object, these objects are unlikely to be of uniform size, significance or value, so determining the equivalence or otherwise

[64] API, Article 41(2). Consider in this context Sharkey 2008, p. 87 and Wagner 2013, pp. 25–27, emphasizing by reference to a poignant scenario the increased potential for mechanical attack decision-making to misinterpret the status and intentions of individuals involved in ambiguous activities or situations.

[65] API, Article 51(5)(a).

of their respective concentrations would seem, at face value, to presuppose the involvement of a human brain.[66] Furthermore, determining the confines of the locality under consideration may be a challenging task for controlling software to undertake. However, the author is careful not to exclude entirely the possibility that machines may in the future be capable of undertaking such decisions. How soon such a capability will materialise remains to be seen.

The second example of prohibited indiscriminate attacks set forth in API comprise attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[67] So here again an evaluative process is required. An expectation must be formed as to the civilian injury and/or damage consequent upon the planned attack. The military advantage to be derived from the attack must be considered, and the relationship between these inherently dissimilar and unmeasurable notions must be determined in order to decide whether the former is excessive in relation to the latter.

The inability to measure these notions can render the required evaluations challenging for human decision makers, particularly in close cases. While considerable research effort is being devoted to trying to mechanize the process, the evaluative nature of the decision and the dissimilarity of the notions being compared means that autonomous evaluation of proportionality decisions is unlikely to be achieved in the near term.[68]

For the time being, avoiding this probably temporary 'road block' will likely involve so planning autonomous attack missions that the necessary evaluative precautions can be taken before UCAV launch. However, this will only comply with the precautions rules if the concentrations of civilians and/or of civilian objects in the area of territory to be searched by the UCAV and throughout the period of the search can be predicted with acceptable confidence at the time when the decision is taken to launch the UCAV mission. In these narrowly defined circumstances, autonomous attack missions are capable of being undertaken consistently with the precautions rules.[69]

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[66] JDN 2/11, para 206(b).

[67] API, Article 51(5)(b). See Anderson and Waxman 2013, pp. 12–14, where it is noted that current legal and ethical concerns are likely to be addressed by only fielding 'autonomous' weapon systems that are clearly lawful because they are much more circumscribed in their operation than the law would allow.

[68] See for example Sharkey 2011, p. 88, Wagner 2012, pp. 17–18, Akerson 2013, p. 69 and Boothby 2011, pp. 282–287. See also Schmitt and Thurnher 2013, pp. 255–256; those authors conclude that "Given the complexity and fluidity of the modern battlespace, it is unlikely that, despite impressive advances in artificial intelligence, "machines" will soon be programmable to perform robust assessments of a strike's likely military advantage on their own" and that for the immediate future the actual proportionality decision will continue to be made by humans; Schmitt and Thurnher 2013, p. 257.

[69] Boothby 2012, pp. 284 and 285.

Such decision-making will in practice be based on 'pattern of life' data, drawn from satellites, manned information gathering aircraft, unmanned information gathering aircraft, human intelligence and other sources. Activities in the area of search may be seen to be so predictable that an expectation can be developed as to the civilians/civilian objects that will be present in a particular location at a specified time. Thus, it may be possible to undertake an unmanned autonomous attack mission lawfully if the area of search allocated to the platform is either remote desert, open ocean, some other depopulated area in which there is no prospect of civilians or civilian objects being present or where, perhaps for some other reason, the civilian injury or damage to be expected can be determined with acceptable reliability in advance of the mission. The generic military advantage to be anticipated from the attack of an object, say, that the algorithm software is designed to identify may be known in advance and this, coupled with the apparent reliability of the collateral damage forecast may give a basis on which a proportionality evaluation can properly be undertaken.

Another issue raised by autonomous attack technology concerns the timing of the attack. It will be recalled that a statement made by the UK on ratification of API refers to those responsible for planning, deciding upon or executing attacks necessarily having to reach decisions based on their assessment of the information from all sources which is reasonably available to them at the relevant time.[70] The question that the employment of autonomous attack technology raises is when is the relevant time for those purposes. Clearly, a sensible answer to the question requires that we break down the activities referred to in the statement. Thus, a human being will continue to be involved in planning the autonomous mission and the information base on which he formulates his plans must of necessity be that which is available at the time of his planning activity. It is the 'deciding upon' and 'executing' of attacks that pose the problem, because in the case of autonomous technology, the machine decides upon and executes the attack.

The time of the decision and of execution in the case of an autonomous mission would seem to be the time when the mission is launched, because that is the time when human input to the target recognition systems determines what the machine will attack. After all, for these purposes the time of execution of, e.g., a Tomahawk land attack cruise missile attack must be taken to be the time when the missile is launched, not the time when it impacts and detonates. Where autonomous, self-aware systems of the sort described in JDN2/11 are concerned, however, the position may be different. If such future systems replicate a human evaluative decision-making process, it would seem logical that the timing of that sort of attack decision must be taken to be the time when the system logic, which after all *ex hypothesi* replicates human decision-making processes, determines that the attack shall proceed. Similarly, the time of execution must be taken to be the time when the weapon is released by the autonomous platform.

[70] Statement (c) made by the UK on ratification of API on 28 January 1998.

The distinction here, therefore, is between what can be described as 'simple autonomy', that is the mechanical implementation of a decision-making process pre-ordained by the personnel initiating the mission, and the more futuristic version of autonomy, or 'complex autonomy', namely the mechanical implementation of an attack decision made by mechanical systems that replicate human evaluative decision-making processes.

So, as Markus Wagner observes, complex autonomy would, in relation to target selection, have to be able to anticipate all potential decisions in an abstract manner. It would need to be able to determine how many civilian casualties would be acceptable in the prevailing circumstances, which kind of weapon could be used under which circumstances, what the expected collateral consequences of using each are, what military advantage is to be anticipated from attacking alternative military objectives, what means and method of attack will minimize expected collateral damage and so on, and it would need to be able to react to changing circumstances.[71]

4.5 Unmanned Attack: What Does the AMW Manual Provide?

As we noted in Chap. 3, the AMW Manual consists of a restatement of the *lex lata* of customary international law.[72] Accordingly, in this section the focus is on that Manual's assessment of the rules that bind all States irrespective of the particular treaties by which they are legally bound. The author should make it clear that he generally supports the thinking on which the discussion in the AMW Manual is based, not least because the author was the expert involved in the AMW Manual project who prepared the initial paper that addressed, inter alia, unmanned aircraft capabilities.

In the AMW Manual, unmanned aerial vehicles (UAVs) are defined as 'unmanned aircraft of any size which do[..] not carry a weapon and which cannot control a weapon'.[73] This is clearly an appropriate definition on which to base a proper discussion of relevant legal issues. UAVs are indeed aircraft because they derive lift from aerodynamic forces, and their navigation will either be autonomous or operator-controlled. 'Any size' indicates that these UAVs include full-sized aircraft through to flying machines that resemble model aircraft. UAVs can be employed for reconnaissance, surveillance, transport, remote sensing, and other activities for which the use of a manned aircraft may involve unacceptable risk for the pilot and/or airframe, or which may be otherwise less advantageous.[74] The modest size and noise signature and extended loiter times in the vicinity of prospective targets are referred to in the AMW Manual's Commentary as useful

[71] See Wagner 2011, p. EAP9. Consider, however, Myers 2009, p. 89.

[72] AMW Manual, Foreword, pp. 1–4.

[73] AMW Manual, rule 1(dd).

[74] AMW Manual, commentary accompanying rule 1(dd), paras 1, 2 and 4-6.

features to the use of UAVs[75] but shootings down of UAVs in recent months demonstrate that they can also be vulnerable to a suitably equipped adversary.[76]

The AMW Manual draws a distinction between UAVs and Unmanned Combat Aerial Vehicles (UCAVs), which it defines as 'unmanned military aircraft of any size which carr[y] and launch […] a weapon, or which can use on-board technology to direct such a weapon to a target'.[77] The distinction between UAVs and UCAVs is immediately clear, and its legal significance is obvious. The latter consist only of UAVs that either carry and fire a weapon or that can direct a weapon that may have been brought to the relevant location by some other platform. Discussion of UCAVs therefore focuses immediately on the international law rules governing attacks.

To be a UCAV, the aircraft must therefore fulfil the requirements of a military aircraft.[78] Moreover, "only military aircraft, including UCAVs, are entitled to engage in attacks".[79] This has legal implications. For example, for it to be legitimate for a remotely piloted UCAV to be used to undertake belligerent acts, such as attacks, its controller must be subject to regular armed forces discipline. Where autonomous UCAVs are concerned, it will therefore be necessary for their programming to be executed by persons "subject to regular armed forces control".[80]

The AMW Manual makes the following points in relation to the taking of precautions when attacks by UCAVs are undertaken.

1. "The obligation to take feasible precautions in attack applies equally to UAV/UCAV operations".[81] This makes the sensible point that the legal obligation to take feasible precautions in attack applies equally to attacks employing unmanned

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[75] AMW Manual, commentary accompanying rule 1(dd), para 7.

[76] See, for example, Israeli Fighter Jets Shoot Down Drone, Daily Telegraph, 7 October 2012 available at www.telegraph.co.uk/news/worldnews/middleeast/israel/9592263/Israeli-fighter-jets-shoot-down-drone.html. Consider also the apparent capture by Iran in December 2012 of a US RQ-170 Sentinel aircraft allegedly by hijacking the aircraft electronically and then steering it to the ground; see Gardner 2011, available at www.bbc.co.uk/news/world-us-canada-16095823.

[77] AMW Manual, Rule 1(ee).

[78] So it must be operated by the armed forces of a state, it must bear the military markings of that state, it must be commanded by a member of the armed forces and must be controlled, manned or pre-programmed by a crew subject to regular armed forces discipline; Hague Draft Rules of Aerial Warfare, 1923, Articles 3 and 14 and AMW Manual, rule 1(x).

[79] See Hague Draft Rules of Aerial Warfare 1923, Articles 13 and 16 and AMW Manual, Rule 17(a). In the Commentary associated with Rule 17(a), the AMW Manual makes the points that the sensors and computer programmes must be able to distinguish between military objectives and civilian objects, as well as between civilians and combatants, that the prohibition on the exercise of belligerent rights extends to state aircraft other than military aircraft but that state aircraft other than military aircraft may continue to perform genuine law-enforcement activities.

[80] AMW Manual, commentary accompanying Rule 1(x), para 6.

[81] AMW Manual, Rule 39. "In the case of autonomous systems, the UCAV must only be programmed to engage potential targets based on reliable information that they are lawful targets. The performance of the sensors and the programme identifying lawful targets must be comparable to that of manned aircraft or to that of remotely piloted (i.e. non-autonomous) UCAVs"; AMW Manual, Commentary accompanying Rule 39, para 4.

technologies as to attacks using other means of warfare. It is an important point, therefore, because it means that the employment of automated or autonomous systems to prosecute attacks is only permissible if feasible precautions can be taken.

2. Given that there are no specific law of armed conflict treaty law rules relating to UAV/UCAV operations, the AMW Manual, having pointed out that the general feasible precautions obligation extends to such operations, comments that UAVs, with their on-board sensors, may positively contribute to verification of the target's status as a military objective.[82] "On-board and/or other reasonably available sensors and sources of intelligence" must be used "to the extent feasible, to verify the target and assess expected collateral damage".[83] This is clearly a correct interpretation of how the Article 57(2)(a)(i) verification obligation applies to unmanned information gathering operations.

3. The AMW Manual notes, correctly, that "[t]he fact that the UCAV is unmanned does not necessarily detract from the reliability of the information on which the decision to attack is based. Indeed, such assessments by remote operators may be more reliable than those of aircrews on the scene facing enemy defences and other distractions".[84] The decisions of remote operators will not necessarily be more reliable, of course, but it would clearly not be correct to assume that they will be less reliable.

4. Autonomous attack UCAV technology must be so programmed that it only engages potential targets on the basis of reliable information that they are in fact lawful targets and sensor performance must be comparable to that achieved in piloted, or operator-controlled unmanned, aircraft. This statement is undoubtedly correct, but inevitably tends to beg the question of how this is to be achieved. Consider for example the obligation in Article 57(2)(a)(ii) to choose means and methods to avoid or minimize civilian injury and damage. If an autonomous system is designed to loiter, search for and attack items or persons in accordance with criteria fed into the controlling software, one of the many technical challenges will be to develop ways in which the system can comply with the obligation to consider alternative methods and means, bearing in mind that those alternative means or methods are not, or at least may not be, carried on the relevant platform. Perhaps similar considerations apply in relation to Article 57(3) of API.

5. The normal rules in the law of targeting relating to doubt, namely the rules in Articles 50(1) and 52(3) of API, also apply where attacks are undertaken using a UCAV,[85] and where this is feasible, that is practicable, a choice should be made

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[82] AMW Manual, Commentary accompanying Rule 39, paras 1 and 2. If available and if their use is feasible, they should be used to "enhance the reliability of collateral damage estimates (especially when this can be done in real-time)".

[83] AMW Manual, Commentary accompanying Rule 39, para 3.

[84] AMW Manual Commentary accompanying Rule 39, para 3 ibid.

[85] AMW Manual, Rule 12(a) is based on API, Article 50(1) which states: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian". Rule 12(b) is based on API, Article 52(3) which states "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school,

between manned and unmanned technology for undertaking the attack. The relevant part of the Commentary actually refers to "UCAV attacks, whether autonomous or manned". This should of course be a reference to attacks "whether autonomous or remotely piloted".[86]

6. A manned attack may be called for where visual identification by aircrew, or the sensors in a manned platform, are likely to achieve a superior, meaning a more discriminating, outcome. In other cases, however, the persistence over the target area that a UCAV will afford may mean that an unmanned attack is the more appropriate method.[87] The essential point here is that where both technologies, manned attack and UCAV attack, are available, they should both be considered "in determining how best to attack a target while avoiding – or, in any event, minimizing – collateral damage". So again the Manual is making the valid point that this is no place for pre-conceived assumptions. Both possibilities should, where available, be considered. In due course, when automated and autonomous attack options become available, it will also be necessary to consider all available attack possibilities, in order similarly to determine how to avoid or minimize collateral damage.

7. To be legally acceptable, attacks using unmanned platforms must involve the precautionary measures that international law prescribes for all attacks. The peculiar circumstances of unmanned operations, whether remotely piloted or autonomous, will not justify avoiding or circumventing those requirements.

We should now consider the customary rules as to targeting as these are expressed in the AMW Manual because these are the rules that bind all states and it is the ability of unmanned, including simple and complex autonomous systems to comply with all these rules that must be considered.

The basic rule is that "constant care must be taken to spare the civilian population, civilians and civilian objects".[88] The Manual goes on to require that: "Constant care must be taken by all those involved in planning, ordering and executing air or missile combat operations to spare the civilian population, civilians and civilian objects".[89] This is an all-embracing duty which would seem to extend, among others, to campaign planners, mission planners, navigation equipment programmers, personnel who feed data into the mission control software, load the ordnance, monitor and/or control the operation of the platform, programme the recognition and decision-making software that determines whether an observed object or person is to be autonomously attacked and those who provide, collate, interpret, communicate or present the information on which target decisions are based. This legal duty to take care applies therefore to many categories of personnel and must always be complied

(Footnote 85 continued)
is being used to make an effective contribution to military action, it shall be presumed not to be so used". For possible developments of autonomous systems to enable them to deal with doubt issues, consider Schmitt and Thurnher 2013, pp. 262–265.

[86] AMW Manual, Commentary accompanying Rule 39, para 5.

[87] AMW Manual, commentary accompanying Rule 39, paras 4–6.

[88] API, Article 57(1) has customary law status and is reflected at AMW Manual, Rule 30.

[89] AMW Manual, Rule 34, which is also based on the customary provision in API, Article 57(1).

with by all of them.[90] In addition, there is a duty to take all feasible precautions "to spare all persons and objects entitled to special protection".[91]

The AMW Manual finds that all states must take the following precautionary action in relation to all attacks, including those using unmanned platforms[92]:

1. Do everything feasible "to verify, based on information reasonably available, that a target is a lawful target and does not benefit from specific protection".[93] There are, however, complex issues associated with automatic target recognition technologies. "The higher we set our data-match acceptance criterion the less likely an automatic target recognition system will identify non-targets as lawful targets, but the more probable that the recognition system will fail to identify lawful targets as being lawful targets".[94] It emerges from Backstrom and Henderson's discussion of these matters that there are difficult trade-offs at work here, and it will be for the lawyer to articulate to the engineer the level of probability of correct target identification that is required and the level of probability of incorrect identification and engagement of friendly or civilian assets that can and respectively, that cannot be tolerated.[95]

2. Do "everything feasible to choose means and methods of warfare with a view to avoiding, or in any event minimizing, collateral damage",[96]

3. Do "everything feasible to determine whether the collateral damage to be expected from the attack will be excessive in relation to the concrete and direct military advantage anticipated",[97]

4. "When a choice is possible between several military objectives for obtaining a similar military advantage" select the objective "where the attack may be expected to cause the least danger to civilian lives and to civilian objects, or to other protected persons and objects",[98] and

5. When an air or missile attack may result in death or injury to civilians, issue effective advanced warnings to the civilian population, unless circumstances do not permit.[99]

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[90] AMW Manual, commentary accompanying Rule 30, para 3 and commentary accompanying Rule 34, paras 2–4.

[91] AMW Manual, Rule 31. This Rule applies to medical and religious personnel, medical units and transports, medical aircraft, the natural environment, civil defence, cultural property, objects indispensible to the survival of the civilian population, UN personnel and persons and objects protected by virtue of special agreements; AMW Manual, Commentary accompanying Rule 31, para 2.

[92] For a discussion of the precautions that the law requires in attack, see Dinstein 2010, pp. 138–145 and for a detailed evaluation of these rules see Rogers 2012, pp. 125–159.

[93] See API, Article 57(2)(a)(i) and AMW Manual, Rule 32(a).

[94] Backstrom and Henderson 2012, p. 511.

[95] See further Backstrom and Henderson 2012, pp. 510–513.

[96] See API, Article 57(2)(a)(ii) and AMW Manual, Rule 32(b).

[97] AMW Manual, Rule 32(c).

[98] See API, Article 57(3) and AMW Manual, Rule 33.

[99] See API, Article 57(2)(c) and AMW Manual, Rule 37.

Taking these required precautions in turn, the first precaution properly refers to the information reasonably available. All reasonably available information must be considered by all those who plan, decide upon, monitor and operate a UCAV mission and all such persons must do everything possible to verify the lawfulness of the planned attack. Given that a UCAV operator must of necessity make his decisions on the basis of the data shown on his screens, if a sensor, or the link from the sensor to the control facility, is not operating correctly, the resulting information deficit should be disclosed to the operator. He or she will then be in a position to consider whether the available information constitutes a sufficient basis for a decision to proceed with the attack or whether additional information is necessary in order to verify the lawfulness of the planned attack.

Information supporting attack decisions may be corrupted, for example, due to technical malfunction or because of enemy action. If for any reason those sensors, their associated links, autonomous decision-making processes,[100] or any other equipment vital to targeting decision-making is not working as it should, a suitably cautious, fail-safe approach to autonomous attack missions would imply that the mission control software should be equipped to detect any such failure or interference, should automatically call off the mission and should return the platform to base.

Appropriate steps must be taken to cancel or suspend the attack if it becomes clear that the object of the attack is not a lawful target.[101] An important issue is whether a particular person has the authority to take such action. This will depend on the command and decision-making arrangements of the relevant force or nation. Some states reflected this aspect in statements they made when ratifying API.[102] It would seem that persons with access to the information that would indicate that an attack should be cancelled ought also to be empowered to do so, and vice versa.

When applied to UCAV operations, the second precaution suggest that the operator should consider in advance the different methods of attack that might be employed to yield the desired military advantage. Careful thought may suggest, for example, that the military advantage could be achieved without undertaking any attack or that minimizing collateral damage would involve using some other appropriate and available method of warfare, for example the use of special forces, rather than by employing a UCAV, whether autonomous or remotely piloted. The rule requires that those who decide upon the method to be used must do all that they can to make sure that the chosen weapon and the way in which it is to be used

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[100] An example would be the target identification software located on an autonomous UCAV.

[101] See API, Article 57(2)(b) and AMW Manual, Rule 35(a).

[102] Consider, for example, the statement made by Switzerland on ratification of API on 17 February 1982: "The provisions of Article 57, para 2, create obligations only for commanding officers at the battalion or group level and above. The information available to the commanding officers at the time of their decision is determinative." On ratifying the same instrument on 28 January 1998, the UK made statement (o) as follows: "The UK understands that the obligation to comply with para 2(b) only extends to those who have the authority and practical possibility to cancel or suspend the attack".

reduce collateral damage to a minimum. If a UCAV attack is to take place, there will come a time when a further decision is needed as between an operator-controlled or autonomous mission, employing either simple or complex autonomy; similar considerations will apply to that decision.

The requirement in the third precaution to do everything feasible to determine whether the attack will comply with the proportionality rule also applies to all personnel involved in the planning and execution of UCAV operations. They must, at all times, take all practically possible action to this end. The only time when the obligation to act ceases is when the attack can no longer be cancelled, for example because a bomb has already been released from the attacking aircraft. It follows from this that the assessment of the lawfulness of the attack must constantly be reassessed up to the point of that final decision shortly before weapon release, i.e. until the point when the attack can no longer be cancelled or diverted.

Consider, therefore, the example of an autonomous UCAV mission that is being planned, or in which the platform is still employing its sensors to search for targets. If in such a situation information becomes available which leads to the conclusion that the object for which the sensors are to search is no longer a military objective or that the attack would no longer be discriminate, the mission should be cancelled and the sensor control software should be instructed to terminate the search. So if new information reveals that a column of refugees is moving across the area of search, the assessment that was performed before the autonomous mission was planned should be reassessed and, if it is now concluded that the attack would no longer comply with the proportionality rule, the search should if possible be stopped.

The difficulties discussed earlier in this chapter in relation to the mechanization of evaluative decision-making suggest that, for the foreseeable future, a person will always need to be in a position to cancel both simple and complex autonomous operations if the need should arise. This implies, of course, that while the technology may be capable of operating autonomously, it will for legal reasons be necessary to keep a human being sufficiently in the loop to be able to observe what is taking place and, if necessary, to over-ride autonomously reached attack decisions.

Consider, however, the incident on 3 July 1988 when the USS Vincennes, employing an Aegis radar system, erroneously shot down Iran Air Flight 655 thereby killing all 290 passengers and crew. The Aegis system registered the aircraft with an icon that made it appear to be an Iranian F-14 fighter aircraft. Although "the hard data were telling the human crew that the plane was not a fighter jet, they trusted the computer more"; not one member of the crew challenged the computer assessment and they authorized it to fire.[103] As Peter Singer notes, what it means to have humans 'in the loop' of decision-making in war is being redefined. It is therefore critical that everything practically possible is in fact done to verify the status of the objective of the attack and the lawfulness of the planned attack and that human decisions are made with as much care and

[103] Singer 2011, p. 341.

deliberation as the circumstances permit. This implies that the foreseeable workloads of controllers of unmanned systems must be so adjusted as to seek to ensure that proper decisions are made, taking all available information into account.[104]

Where autonomous systems are concerned, Peter Asaro fears that "such systems may not have an identifiable operator in the sense that no human individual could be held responsible for the actions of the autonomous weapon system in a given situation, or that the behavior of the system could be so unpredictable that it would be unfair to hold the operator responsible for what the system does".[105]

It may indeed be hard to identify where individual responsibility lies for erroneous attacks employing a selection of modern complex technologies, if indeed any human fault at all has occurred, but this is an issue that goes rather wider than autonomous weaponry. The law as to precautions in attack in Article 57 of API is largely written in the passive mood, with the result that there is no prescriptive detail as to exactly how the required precautions must be fulfilled. Specifically there is no requirement that a person, as opposed to a machine, must undertake the precautions in Article 57(2)(b), 57(2)(c) and 57(3). The precautions under Article 57(2)(a) are addressed to those who plan or decide upon an attack. It follows from this that those who plan automated or autonomous attack missions must be deemed to have planned the resulting attacks and are therefore responsible for taking all the Article 57 precautions, including those under Article 57(2)(a). Similarly the person who, on receipt of the plans, decides that the automated or autonomous attack mission shall take place also, on the basis of similar reasoning, has the responsibility to undertake all Article 57 precautions.

The fact that in an autonomous mission the machine makes certain attack decisions does not absolve these individuals from their responsibilities. The automated or autonomous platform remains a weapon system employed by them, the characteristics of which should be known by them, and it is they who have the responsibility of determining that the use of that weapon system is militarily and legally appropriate to the circumstances as they understand them to be.

For the fourth precaution to be relevant, two conditions must apply. First, a choice must be possible and secondly the alternative military objectives must offer a similar military advantage. In practice, it is entirely possible that, due to the tactical situation, similar kinds of target may have very different military values.[106] The operator of a remotely piloted UCAV will use the information fed to him to determine the military advantage to be expected from alternative targets. Such decision-making may prove somewhat challenging for decision-making processes employing complex autonomy as such processes may be unable to reflect the necessarily subjective appreciations that are involved in this assessment.

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[104] This may have implications, as Peter Singer suggests, for plans that a single operator should control multiple platforms; Singer 2011, p. 342.

[105] Asaro 2012, p. 693 citing Sparrow 2007, pp. 62–77.

[106] Attacking an artillery piece that is set up and ready to fire on friendly forces is likely to generate greater military advantage than attacking an identical artillery piece that is remote from the battlespace.

The obligation to warn in precaution (5) raises similar issues to those that apply in the case of operations using manned platforms. Circumstances will generally not permit a warning if the attack is a surprise attack and if the warning is rendered impractical by the circumstances of the attack it is not required. Equally, if the attack is against a target located well away from civilians and if, therefore, death or injury to civilians is not a possibility, the requirement to warn again does not arise. The tactical and perhaps operational circumstances may determine the degree of detail that can be given in warnings; if autonomous attack methods are to be used, general warnings may refer to approximate areas of search and to the general kinds of attack that it is expected to undertake. The warnings should be communicated by a method that is reasonably expected to be effective, such as by leaflets dropped from manned or unmanned platforms, by radio or television, by cyber means, or by some other effective method employing language that the recipients can reasonably be expected to understand.

4.6 Precautions Against the Effects of Attacks

API provides that parties to the conflict are obliged to take precautions against the effects of attacks. These are sometimes and inaccurately referred to as 'defenders' precautions'.[107] The first such precaution requires parties to the conflict, to the maximum extent feasible and subject to Article 49 of Geneva Convention IV, to "endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives".[108] The AMW Manual finds a corresponding rule relating to air and missile operations as follows: "Belligerent Parties subject to air or missile attacks must, to the maximum extent feasible, endeavor to remove the civilian population, individual civilians and other protected persons and objects under their control from the vicinity of military objectives."[109]

The second precaution required by API obliges parties to the conflict, again to the maximum extent feasible, to 'avoid locating military objectives within or near densely populated areas".[110] The equivalent Rule in the AMW Manual is: "Belligerent Parties subject to air or missile attacks must, to the maximum extent

[107] Yoram Dinstein refers to them as 'passive' precautions, which more accurately reflects their nature; Dinstein 2010, p. 145. It must be remembered that a party to the conflict that is in a defensive posture is obliged, by virtue of the definition of 'attack' as including acts of violence in defence, to take precautions in attack whenever it undertakes an act of violence; furthermore, a party to the conflict that is in an offensive posture is also required to undertake precautions for example to protect the civilian population, individual civilians and civilian objects under its control.

[108] API, Article 58(a).

[109] AMW Manual, Rule 43.

[110] API, Article 58(b).

feasible, avoid locating military objectives within or near densely populated areas, hospitals, cultural property, places of worship, prisoner of war camps" and certain other facilities entitled to specific protection.[111]

The third such precautionary rule in API provides that parties to the conflict must, again to the maximum extent feasible, "take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations".[112] The AMW Manual finds a rule relating to air and missile operations as follows: "Belligerent Parties subject to air or missile attacks must, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[113]

The AMW Manual Commentary makes the point that "in modern air and missile warfare it may prove necessary to consider other methods than marking in order to bring protected locations to the notice of the enemy".[114] Doing everything practically possible to ensure the protection of civilians and civilian objects in the control of a party to the conflict is an obligation we must bear in mind when, later in this chapter, we consider large-scale cyber deception operations. The question to consider is whether large-scale and sophisticated cyber deception operations that deprive the attacker of the accurate information he needs to comply with the distinction and discrimination rules are consistent with the good faith application of this Rule.

The AMW Manual Commentary notes that UCAVs potentially offer the opportunity to penetrate enemy airspace to a greater extent than may be possible for manned platforms and that a Party in control of territory that is aware its adversary possesses such unmanned capability has a greater obligation when it comes to taking these precautions.[115]

API also prohibits the use of the presence or movement of the civilian population or of individual civilians to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.[116]

The fourth and final rule provides that "[a]ny violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57".[117]

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[111] This Rule is based on API, Article 58(b) but also takes account of Geneva Convention I, Article 19(2) and Geneva Convention IV, Article 83; AMW Manual, Rule 42.

[112] API, Article 58(c).

[113] AMW Manual, Rule 44.

[114] AMW Manual, Commentary accompanying Rule 42, para 3.

[115] AMW Manual, Commentary accompanying Rule 44, para 4.

[116] API, Article 51(7) and see also AMW Manual, Rule 45.

[117] API, Article 51(8). This is reflected in AMW Manual, Rule 46.

If, therefore, the party to the conflict in control of territory deliberately places a military objective, such as a tank, in close proximity to a civilian hospital in deliberate breach of these rules, the attacking Party that is considering using a UCAV to attack the tank must take all feasible precautions to verify that the attack will comply with the discrimination and proportionality rules. This may well be an example of the sort of attack that could not legitimately be undertaken using autonomous attack technology, whether simple or complex. The attacker cannot rely on the clear legal breach by the enemy and decline to undertake the required precautions in attack.

The AMW Manual rule usefully emphasizes the complementary relationship between the attacker's obligations and the precautions that must be taken against the effects of attacks. This is an aspect that must be borne in mind when any policy of widespread, systemic cyber deception operations is being considered.

4.7 What are Cyber Operations and Cyber Attacks?

The focus of discussion now shifts to 'cyber operations'. An International Group of Experts convened by the Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia, in 2009, worked for three years to produce a Manual on the law relating to cyber warfare. The Manual was published in 2013[118] and represents the contemporary rules of international law that the Experts consider apply to cyber warfare. It should be recognized that not all states agree that the existing framework of international law can be applied in its entirety in cyberspace, although it is understood that China "believes that it is possible to revise or clarify existing international rules so that they can apply to cyberspace, as well as to create new rules".[119]

Importantly, consensus has been achieved by the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. The Experts have issued a report finding that international law applies to states' use of information and communications technologies (ICT). State sovereignty and associated international norms and principles are found by the Report to apply to states' ICT activities and to their jurisdiction over ICT infrastructure within their territory. States must also meet

[118] Tallinn Manual, published by Cambridge University Press. For a broad discussion of the challenges and legal issues posed by cyber warfare, see also Droege 2012, 533.

[119] Zhang 2012, p. 804. Mr Zhang comments that although existing laws on armed conflicts and general international principles may all apply to cyberspace, there are still many issues that need clarification, such as attribution of a cyber attack to its perpetrator and how to determine whether the damage caused was proportionate so that self defence was legal. China wishes to "actively contribute to developing legal rules applicable to cyberspace"; Zhang 2012, pp. 804 and 806. Clearly, The Tallinn Manual will afford China and other states a basis on which to formulate, and articulate, their own positions.

their international obligations with regard to internationally wrongful acts attributable to them. The Report also recommends that states take various measures to build trust, transparency and confidence.[120]

The Experts' finding that international law applies to states' use of ICT, and thus it seems to activities by them in cyberspace, supports the finding of the Tallinn Experts in that regard. It therefore seems sensible to conduct the discussion in the present Section and in other parts of this book, where relevant, by reference to the rules and Commentary in the Tallinn Manual.[121] It should, however, be remembered that while there may be a growing consensus that international law applies, views will differ as to how particular rules should be interpreted in particular cyber situations, and future consensus will not necessarily adopt the Tallinn Manual approach.

In this section, we shall consider what 'cyber operations' means, the law that applies to such operations, and, first, the meanings of some of the terms that we shall use.

'Cyber', for example, denotes a relationship with information technology, while 'cyberspace' is the environment formed by physical and non-physical components characterized by the use of computers and the electromagnetic spectrum to store, modify and exchange data using computer networks. As a result, cyber operations consist of the employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace.[122]

A complex issue addressed in the Tallinn Manual is the notion of 'cyber attack'.[123] API defines 'attacks' as "acts of violence against the adversary, whether in offence or defence'[124] while the AMW Manual refers to "an act of violence, whether in offence or defence". The omission of the reference to the adversary in the AMW Manual formulation avoids confusion as to whether an act of violence against enemy civilians or civilian objects in connection with the conflict would also amount to an attack.[125] The philosophical difficulty the Tallinn Experts needed to resolve was whether the idea of cyber attack makes sense given that the initiating act is likely to be nothing more violent than pressing the enter key on a computer key board.

Michael Schmitt's view that it is the injurious or damaging consequences that flow from a cyber operation that will be relevant to its characterisation as a 'cyber attack',

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[120] The Report is available at www.asil.org/ilib130819.cfm. As to the importance of confidence building measures, their status in international law and their potential application to cyberspace issues, see Ziolowski 2013.

[121] On 18 September 2012 the Legal Adviser to the US State Department, Harold Koh, gave answers to some fundamental questions in relation to cyber operations. For a discussion of those answers by reference to the corresponding propositions in the Tallinn Manual, see Schmitt 2012.

[122] Glossary of Technical Terms annexed to the Tallinn Manual, pp. 257–262.

[123] For discussions of the notion of cyber attack, see Droege 2012, pp. 556–560 and Turns 2013, 209–227.

[124] API, Article 49(1).

[125] AMW Manual, Rule 1(e) and commentary accompanying Rule 1(e), para 1.

not the violent or other nature of the initiating act[126] was adopted by the Tallinn Experts. Accordingly, the Tallinn Manual opines that a cyber attack "is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects".[127] Cyber interference with civil aviation may, for example, have the relatively direct effect of causing death, injury or damage.[128] The electricity grid and utilities will frequently be civilian objects and thus protected from lawful attack during periods of armed conflict; but such facilities have been the subject of recent cyber activity which has not necessarily resulting in injury or damage and therefore which did not necessarily amount to a cyber attack as that notion is defined for the purposes of the Tallinn Manual.[129]

4.8 Characteristics of Cyber Warfare and Deception Operations

Relatively recent events make it clear that it is possible to undertake activities by cyber means within a target computer network, including changing the way in which systems controlled by that network operate, without the operator of that network necessarily becoming aware of what is going on. During the Stuxnet attack against Iranian nuclear centrifuges discovered in 2010, malware affected the computerized control of the centrifuges so as to cause the latter to revolve at excessive speed, with the result that the centrifuges were reportedly damaged. It appears that the cyber attack was so conducted that the sensors and computers responsible for monitoring the performance of the centrifuges were provided with false status data and thus had, and presented, a false overview of the status of the centrifuges, namely that they were operating normally. We can deduce from this that cyber deception may involve pretence that no attack has occurred, or that no military cyber operation has taken place, when in fact it has.[130]

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[126] Schmitt 2011, pp. 93–94. Note, however, Dörmann 2004, p. 6, accessible at www.icrc.org/eng/resources/documents/misc/68lg92.htm.

[127] Tallinn Manual, Rule 30.

[128] Consider, for example, Meredith 2010, available at www.livescience.com/10048-malware-implicated-fatal-spanair-plane-crash.html.

[129] Note, for example, Gorman 2009, available at http://online.wsj.com/article/SB123914805204099085.html and Nakashima and Mufson 2008, available at www.washingtonpost.com/wp-dyn/content/article/2008/01/18/AR2008011803277.html.

[130] Stuxnet is delivered in part by a computer worm. It inserts itself onto air-gapped networks by means of such devices as a thumb drive, a DVD or a CD-ROM. It checks for a distinct set of conditions such as the presence and configuration of a specific industrial control software, before activating. It then operates in a designed way. Sophisticated malware delivered in a similar way was used to effect the Stuxnet attack on Iran in July 2010; see Fildes 2010, at www.bbc.co.uk/news/technology-11388018 and Broad et al. 2011, available at www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?pagewanted=all. As to the likelihood of future clandestine operations in cyberspace, consider UK Ministry of Defence, DCDC, Future Land Operating

Cyber deception operations might, alternatively, take the form of providing false information about the identity of the person who undertook a computer activity, or as to the machine that was used to do so or as to the state or entity, if any, on whose behalf that activity was performed. Equally, a cyber deception operation may be designed to conceal the identity or affiliation of the person who undertook a cyber activity without necessarily seeking to pretend that any other particular person or entity was responsible.[131]

Cyber deception will not necessarily be limited to the authorship of a cyber operation. The nature of the activities undertaken on a particular network may be falsely described, for example by electronically labelling military logistics activities as medical processes in order to protect them unlawfully from attack. A party to the conflict may use cyber means to give out false information as to the disposition of its own forces or it may intrude into enemy computer networks and insert false information in substitution for correct data. Enemy communications

(Footnote 130 continued)
Concept, JCN 2/12 dated May 2012 para 349, which emphasizes the need to resource and exercise the integrated exploitation of deception operations, and of defensive measures against deception, particularly through the use of emerging technologies and cyberspace. The need to use military and civilian intelligence agencies to coordinate such deception-related activities is noted at para 350. Current UK air power doctrine describes Offensive Counter Space (OCS) Operations in terms of preventing adversaries from exploiting space "by attacking their capabilities through deception, disruption, denial, degradation and destruction. As adversaries become more dependent on space, OCS Operations will become increasingly important in affecting their ability to organize and orchestrate military campaigns"; British Air and Space Power Doctrine, Air Publication 3000, 4th edition available at www.raf.mod.uk/rafcms/mediafiles/9E435312_5056_A318_A88F14CF6F4FC6CE.pdf. Note also the reference to compromise and disruption of cyber assets by other states and by patriotic hackers, in para 2.5 of the UK Cyber-Security Strategy, Protecting and Promoting the UK in a Digital World, November 2011 available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/60961/uk-cyber-security-strategy-final.pdf and see the reference in paras 4.8–4.12 to measures being taken to address these challenges, including work by the UK Ministry of Defence to seek to ensure that defence networks and equipment are protected against cyber attack.

[131] Note the difficulty in determining which state, if any, sponsored or supported the cyber operations undertaken against Estonia in 2007; Owens et al. 2009, pp. 173–176. Consider also the cyber operations against Georgia in July and August 2008, the apparent involvement of private citizens in those activities and the difficulties this poses for any determination as to who is acting on behalf of which state or entity, if any, and with what level of authority if any; see for example Markoff 2008, at http://bits.blogs.nytimes.com/2008/08/11/georgia-takes-a-beating-in-the-cyberwar-with-russia/ and Morozov 2008 at www.slate.com/articles/technology/technology/2008/08/an_army_of_ones_and_zeroes.html. See also US Department of Defense Strategy for Operating in Cyberspace, July 2011, available at www.defense.gov/home/features/2011/0411_cyberstrategy/docs/DoD_Strategy_for_Operating_in_Cyberspace_July_2011.pdf, p. 3, where the US Department of Defense expresses particular concern about three areas of potential activity by adversaries, namely "theft or exploitation of data; disruption or denial of access or service that affects the availability of networks, information or network-enabled resources; and destructive action including corruption, manipulation, or direct activity that threatens to destroy or degrade networks or connected systems." Consider also TRADOC Pamphlet 525-7-8, The US Army's Cyberspace Operations Concept Capability Plan 2016-2028, dated 22 February 2010 available at www.tradoc.army.mil/tpubs/pams/tp525-7-8.pdf.

may be corrupted or forged, false orders may be issued, inaccurate sensor data may be inserted into computer networks that support targeting decision-making, pattern of life data may be corrupted and the common operational picture may be distorted or deleted. This is not, of course, a complete list of the possible deception operations that may be undertaken in the course of future armed conflicts but they would seem to be realistic examples.

It would therefore seem likely that future armed conflict will be characterized by the ability to intrude into and interfere with the enemy's networks, such as those supporting targeting decision-making, leaving no indication of having done so. The data on which the enemy relies in making its targeting decisions can therefore be rendered unreliable or factually wrong without the enemy becoming aware. A Party to the conflict that is seeking to comply with its obligations under the distinction and discrimination principles and precautions rules may, based on the resulting false picture of the battlespace, make erroneous targeting decisions with the result that attacks directed at enemy combatants or military objectives in fact engage civilians or civilian objects. The attacking Party may have done everything feasible to verify the lawfulness of the planned attack and, indeed, his systems may continue falsely to confirm to him its lawfulness. The issue to consider is whether deception operations that have such effects comply with extant law of armed conflict rules. In order to address that question, however, we must consider briefly the history of military deception operations.

4.8.1 Putting Cyber Deception Operations into a Historical Context

The use of deception operations in armed conflict is nothing new and is a lawful method of warfare. In the Aeneid Virgil refers to the employment of a wooden model of a horse to infiltrate a Greek unit into the city of Troy after ten years of siege.[132] In much more modern times, Operation Mincemeat[133] during World War Two was designed to lead the German High Command to believe that the focus of the allied attack in 1943 would be on Sardinia and Greece whereas Sicily was where the planned attack would actually occur. The method of deception was to deposit a dead body bearing concealed papers disclosing the false plan.

During World War One false nationality marks were used on aircraft. As Spaight observes, 'The inadmissibility of the use of such marks was established, first, by the accusations which the belligerents made against one another of resorting to the practice, secondly by their indignant denials of any complaints that they had done so themselves".[134] However, the simple feigning of death to avoid

[132] Virgil, Aeneid, Book II.

[133] Mcintyre 2010.

[134] Spaight 1947, pp. 85–86.

being attacked and in order thereafter to escape from a difficult tactical situation is an established and legitimate tactic.[135] Similarly, making use of dummy communications to pretend to the enemy that fighter aircraft were active when they were not[136] was also considered to be lawful.

It therefore seems that deception operations were considered lawful if their purpose was to mislead the enemy about the military strength, the identity, the military plans, the military equipment or the operational objectives of the party employing the deception. By contrast, using false or enemy nationality marks in air warfare, for example, was prohibited. So, having briefly considered the historical perspective, we should now turn our attention to the modern law that regulates deception operations.

4.8.2 Deception Operations: The Modern Law on Perfidy, Ruses and Misuse of Indicia

The origins of the modern law on treachery and perfidy are really to be found in the Lieber Code where it is stated, and then reaffirmed, that military necessity permits deception but does not permit perfidy.[137] Specifically, clandestine or treacherous attempts to injure an enemy are stated to be deserving of the most serious punishment because they are so dangerous and it is so difficult to guard against them.[138]

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[135] Spaight 1947, p. 173. Relating the similarly legitimate activities of Lieutenant L G Hawker, who was attempting to attack a German airship shed at Gontrode in April 1915, Spaight reports that he used "an occupied German captive balloon to shield him from fire whilst manoeuvring to drop the bombs"; Spaight 1947, p. 174 citing London Gazette, 8 May 1915.

[136] Spaight 1947, pp. 176–178 cites numerous examples of such ruses in both World Wars.

[137] Expert commentators draw attention to the notion of chivalry, also called honour, that promotes good faith reliance on standards of battlefield conduct. The Canadian Military Manual refers to the conduct of armed conflict in accordance with certain recognized formalities and courtesies. Acknowledging that armed conflict is rarely a polite affair, the concept of chivalry is reflected in specific prohibitions, such as the prohibition of treacherous conduct; Corn et al. 2012, p. 202 citing the Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels. Gary Solis refers to the Islamic Caliph Abu Bakr requiring that there should be no perfidy, no falsehood in treaties with the enemy, that his forces be faithful to all things, proving themselves upright and noble and maintaining their word and promises truly; Solis 2010, p. 420 citing Alib Hasan al Muttaqui, Book of Kanzul'ummal, vol. 4 (c. A D 634) at 472. See also Rogers 2012, pp. 40–42.

[138] Lieber Code, 1861, Articles 16 and 101. For an appreciation of the likely intended meaning of these provisions, see Watts 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220380, pp. 18–21 where, among other aspects, the significance of Articles 15, 63, 65 and 117 of the Code and of other contemporary understanding and writings is discussed. Tracing the evolving arrangements in the Brussels Declaration and in the Oxford Manual, Sean Watts comes to the view that these instruments represent "an early effort to evolve perfidy from generally prohibited conduct to a specific and technically proscribed method of warfare"; Watts 2013, p. 25.

The Hague Regulations 1907 provide that "the right of the belligerents to adopt means of injuring the enemy is not unlimited".[139] More specifically, they especially prohibit "kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army".[140] Article 24 then states: "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible".[141] So an important legal distinction, clearly reflected in more modern provision, is being established here between treacherous, and therefore unlawful, killing or wounding, and ruses and espionage both of which are stated to be lawful.

Article 37 of API is the most modern provision addressing deception operations. It provides:

> (1) It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) 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.
>
> (2) Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

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[139] Annex to Hague Convention IV Respecting the Laws and Customs of War on Land, Article. 22, The Hague, 18 October 1907 which superseded similar provision annexed to Hague Convention II of 1899. The regulations are widely regarded as having customary status and thus as binding all states.

[140] The words 'treachery' and 'perfidy' are, for the purposes of some discussions of deception operations, treated as largely synonymous; Tallinn Manual, para 1 of the Commentary accompanying rule 60 and Cottier 2008, p. 386. Gary Solis acknowledges that there is a difference between them, which he describes as slight; Solis 2010, p. 421. Mike Schmitt links treachery to the offer of a bounty for the assassination of enemy personnel; Schmitt 1995, p. 635. Yoram Dinstein, however, explains that the reach of Article 37(1) of API is somewhat narrower than that of treachery, citing the example of bribing an enemy soldier to assassinate his commander, which would come within the ambit of Article 23(b) but would be excluded from Article 37(1). The act does not involve reliance by the adversary on confidence that international law protects him. Dinstein makes the important point, therefore, that Article 37(1) does not supersede the broader Hague Regulations provisions; Dinstein 2010, p. 232 citing Solf 1982, p. 204. For a discussion of historical examples of treacherous and perfidious conduct, see Watts 2013, pp. 1–9.

[141] Sean Watts describes the Hague Regulations formulation of the perfidy rule as "a nearly rote reproduction of mid-to-late nineteenth century nascent positivism"; Watts 2013, p. 30.

So while both perfidy[142] and lawful ruses[143] are designed to mislead the enemy and as a result to cause him to act contrary to his interests, the differences between them depend, as Yoram Dinstein has pointed out, on the presence or absence of foul play[144] and those differences are legally highly significant. Yoram Dinstein explains that the law strives to ensure that measures of protection will be respected by opposing sides and that the accomplishment of this requires the maintenance of a modicum of mutual trust between the parties to the conflict. "Only if combatants can be confident that the enemy will honour a minimal code of behaviour – avoiding deception where protection is due – will they be willing to abide by the law".[145] The vital distinction lies in the kind of false belief that the operation seeks to induce. A ruse does not relate to protected status under the law of armed conflict whereas perfidy involves causing the enemy to believe that he is either entitled to receive, or must accord, such protection. As the AMW Manual notes, a "typical example of perfidy would be to open fire upon an unsuspecting enemy after having displayed the flag of truce, thereby inducing the enemy to lower his guard".[146]

The Rule is not breached by a perfidious act that does not have an adverse impact on the enemy or in which the adverse effect is limited to annoyance,

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[142] Sean Watts takes the view that, for states party to API, the formulation of the perfidy rule in Article 37 essentially replaces the corresponding rules in the Hague Regulations; Watts 2013, pp. 42–43. As noted above, Yoram Dinstein seems to disagree. Clearly, the Hague Regulations rule against treachery is customary in status and is distinct from the perfidy rule to the extent that the former prohibits activities that are not covered by the latter. For a discussion of the meaning of perfidy, see Oeter 2013, pp. 224–225. For a discussion of examples of perfidy, including the use of a white flag by Argentine forces during the Battle of Goose Green in the Falkland Is/Malvinas War in May 1982 and the perfidious attack on Obergruppenführer Reinhard Heydrich in Prague in 1942, see Solis 2010, pp. 422–423.

[143] Citing the API Commentary, para 1521, Stefan Oeter confirms that transmitting misleading messages for example by using the enemy's radio wavelengths, passwords or codes and infiltrating his command chain to channel false orders, and giving members of one military unit the signs of other military units to convince the enemy that your force is larger than it really is are all established elements of traditional tactics; Oeter 2013, p. 223.

[144] Dinstein 2010, p. 229.

[145] Dinstein 2010.

[146] AMW Manual, commentary accompanying Rule 111(a), para 8. The Tallinn Manual's perfidy rule is expressed in similar terms to Article 37; Tallinn Manual, rule 60. It reflects customary law by limiting the rule to perfidious killing or injuring and by omitting the API reference to capture. Hague Regulations Article 23(b) does not mention capture. Rome Statute of the International Criminal Court, 1998, Article 8(2)(b)(xi) also does not refer to capture. Article 8(2)(e)(ix) of the Rome Statute refers to "[k]illing or wounding treacherously a combatant adversary", a clear reflection of the Hague Regulations formulation, but applying that formulation to non-international armed conflicts. As to the applicability of the perfidy rule to non-international armed conflict, see Jackson 2012, 237–254. It seems evident that the rule would require some minor adjustment in its application to non-international armed conflict, for example to make it clear that a feigning that the individual is not involved in the non-international armed conflict and is entitled to protection under the law of non-international armed conflict would be an example of potentially perfidious activity.

inconvenience or damage.[147] The perfidy must be the proximate cause of the death or injury.[148] The time interval between the perfidious act and the resulting death, injury or capture is not the relevant aspect; what matters is that the former causes the latter.[149]

When applying these principles to the cyber domain, the first issue to consider is whether deception as to protected status that does not operate upon a human mind but that influences the operation of a machine thereby causing death, injury or capture is capable of being perfidy. The Tallinn Experts considered the example of a cyber operation that causes an enemy commander's pacemaker to malfunction causing his death. A majority of them felt that if such a cyber operation betrays the confidence of the computer controlling the pacemaker, it would breach the perfidy rule. The minority view was that the perfidy rule requires that a human mind be deceived as stated in Article 37.[150] The minority view seems to be the right one, as a matter of *lex lata*, on the basis that the computer controlling the pacemaker is not an intelligent agent of the sort which, as a matter of sensible interpretation, must be deceived for the rule to be breached. It remains to be seen whether, as a matter of *lex ferenda,* the rule will at some future time be interpreted as extending to deception of mechanical decision-making processes.

An alternative scenario that raises interesting issues would be a cyber operation against, say, the computer system that controls the air traffic control facility at a military airfield, where air traffic services are provided by employees of a civilian company. The military cyber attacker uses the password of a civilian employee of the company to gain access to the computerized air traffic control system, which he manipulates in order to cause an aircraft incident resulting in deaths or injuries to personnel belonging to the adverse party to the conflict. The confidence of the computer is induced by the misuse of the password, and the misuse takes the form of feigning the civilian status of an employee of the air traffic control company. According to the view of the majority of the Tallinn experts, therefore, this sort of cyber operation would be perfidious. Indeed, according to that majority view, any cyber operation that feigns civilian status by falsely using a civilian's password to gain access to a closed system and which, having falsely obtained that access, causes death, injury or capture of persons belonging to the adverse party will breach the perfidy rule. This would seem to be an improbable interpretation of the rule.

As the AMW Manual notes, the fact "that a person is fighting in civilian clothing does not constitute perfidy"[151] and lawful ruses that give rise to the death,

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147 AMW Manual, commentary accompanying Rule 111(a), para 7.

148 Bothe et al. 1982, p. 204.

149 Tallinn Manual, Commentary accompanying Rule 60, para 6.

150 See Tallinn Manual, commentary accompanying Rule 60, para 9.

151 AMW Manual, commentary accompanying Rule 111(b), para 4; the individual may, however, not be entitled to combatant immunity and may thus be liable to prosecution and punishment under applicable domestic law. See in this regard *Mohamed Ali et al v. Public Prosecutor*, Privy Council, [1969] AC 430 at 449 for the proposition that a regular soldier committing an act of sabotage when not in uniform loses entitlement to prisoner of war status.

injury or capture of enemy personnel do not as a result of so doing become unlawful.[152] Examples of lawful ruses set forth in the AMW Manual are:

> (a) mock operations[153]; (b) disinformation[154]; (c) false military codes and false electronic, optical or acoustic means to deceive the enemy (provided that they do not consist of distress signals, do not include protected codes, and do not convey the wrong impression of surrender)[155]; (d) use of decoys and dummy-construction of aircraft and hangars; and (e) use of camouflage.[156]

The AMW Manual lists, in the context of air operations, the following as examples of perfidious conduct:

> (a) the feigning of the status of a protected medical aircraft, in particular by the use of the distinctive emblem or other means of identification reserved for medical aircraft; (b) the feigning of the status of a civilian aircraft; (c) the feigning of the status of a neutral aircraft; (d) the feigning of another protected status; and (e) the feigning of surrender.[157]

Perfidious or not, aircraft may not improperly use distress codes, signals or frequencies, nor may aircraft other than military aircraft be used as a means of attack.[158] Distress signals may only be used for humanitarian purposes[159] and use of a distress signal to facilitate an attack is prohibited. The distinctions here can be rather fine. Sending a false distress signal is prohibited but flying an aircraft in a way that leads the adverse Party to believe the aircraft has been damaged does not *per se* breach the Rule.[160]

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[152] AMW Manual, commentary accompanying Rule 113, para 3.

[153] The AMW Manual refers to the following as examples of lawful ruses of war: air attacks on the Pas de Calais during the weeks leading up to D-Day in 1944, the movement of, e.g., an aircraft carrier to create a false impression as to the likely nature of an attack and the use of simulated air attacks to persuade the enemy to activate its ground based air defences; see AMW Manual, Commentary accompanying Rule 116(a), paras 2, 3 and 4.

[154] Consider operations to induce the enemy to surrender by creating the false impression that he is surrounded, or that an overwhelming attack is about to occur; AMW Manual, commentary accompanying Rule 116(b), para 2. Contrast the unlawful use of false information as to civilian, neutral or other protected status; ibid., para 3.

[155] The AMW Manual cites as lawful ruses the use of enemy IFF codes, or the use of the enemy's password to avoid being attacked when summoned by an enemy sentry or inducing a false return on the enemy radar screen indicating the approach of a larger force than is the case; commentary accompanying Rule 116(c), paras 2 and 3.

[156] AMW Manual, Rule 116.

[157] AMW Manual, Rule 114.

[158] AMW Manual, Rule 115. IFF codes are not included for these purposes within distress codes signals and frequencies; AMW Manual, commentary accompanying Rule 115(a), para 5.

[159] AMW Manual, commentary accompanying Rule 115(a), para 1.

[160] A damaged aircraft is not necessarily disabled and is not necessarily surrendering; see AMW Manual, commentary accompanying Rule 115(a), para 3. If a pilot of an aircraft deploying paratroopers simulates a situation of distress to give a false impression that the deploying personnel are entitled to protection under Article 42 of API, "this could amount to prohibited perfidy if it leads to the killing, injuring (or capturing) of an adversary"; AMW Manual,

The UK Manual lists the following as lawful ruses:

> transmitting bogus signal messages and sending bogus despatches and newspapers with a view to their being intercepted by the enemy[161]; making use of the enemy's signals, passwords, radio code signs, and words of command; conducting a false military exercise on the radio while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist…; and giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area.[162]

4.8.3 Improper Use of Certain Indicators

Articles 38 and 39 of API prohibit, respectively, the misuse of recognized emblems and of emblems of nationality. Making "improper use" of the distinctive emblem of the red cross or red crescent[163] or of other emblems, signs or signals provided for in the Conventions or in the Protocol is prohibited as is the deliberate misuse of other internationally recognized protective emblems, signs or signals.[164] No particular consequences are required for the rule to have been broken. Improper use, that is any use other than that for which the emblem, sign or signal was intended, suffices to establish the breach.[165] The Tallinn Experts could not agree whether the mere misuse of a domain name such as 'icrc.org' without the misuse of any associated emblem, etc. would breach the rule.[166]

(Footnote 160 continued)
commentary accompanying Rule 115(a), para 4 and note API, Article. 42(3): "Airborne troops are not protected by this Article".

[161] Consider the use of bogus radio messages and vehicle traffic to mislead the enemy as to the intended site of the D-Day landings during World War II, a lawful ruse, see Solis 2010, p. 427.

[162] UK Manual 2004, para 5.17.2. For a reasoned discussion of lawful ruses, including a useful analysis of where legitimate camouflage ends and perfidious conduct starts, see Watts 2013, pp. 51–56. The reference here to misuse of enemy passwords as being a lawful ruse rather supports the view of the minority of the Tallinn Experts that deception directed at a computer's decision-making processes and not to enemy personnel would not constituting perfidy.

[163] See Additional Protocol III to the Geneva Conventions, Article 2(1), which extends this prohibition to the red crystal adopted by that instrument as a distinctive emblem.

[164] This would apply to the distinctive signs for cultural property and for civil defence, to the flag of truce and to the electronic protective markings set out in Annex I to API; Cultural Property Convention, Articles 16 and 17; API, art. 66; Hague Regulations, art. 23(f); and API, Annex I, para 9; Tallinn Manual, Commentary accompanying Rule 62, para 2 and see AMW Manual, Rule 112(a) and (b).

[165] Tallinn Manual, Commentary accompanying Rule 62, paras 3 and 4, in the latter case citing the ICRC Study, commentary accompanying Rule 61.

[166] Tallinn Manual, Commentary accompanying Rule 62, paras 6 and 7.

Under Article 38(2), "[i]t is prohibited to make use of the distinctive emblem of the United Nations, except as authorised by that Organization".[167] Unauthorized use of the emblem by electronic means is therefore also prohibited, but, again, there was no agreement among the Tallinn Experts over whether the rule only extends to the use of the emblem as such.[168]

The use of enemy flags, insignia or military emblems "while engaging in attacks or in order to shield, favour, protect or impede military operations" is prohibited.[169] A majority of the Tallinn Experts considered that "it is only when the attacker's use is apparent to the enemy that the act benefits the attacker or places its opponent at a disadvantage".[170] The Tallinn Manual does, however, acknowledge that "it is permissible to feign enemy authorship of a cyber communication", which seems to reflect state practice on lawful ruses.[171]

Article 39(1) of API prohibits the "use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict".[172] Any use of this sort is unlawful, which is why the word 'improper' is omitted; again, the Tallinn Experts could not agree whether a communication which uses the domain name of the neutral's Ministry of Defence but which omits the neutral's flag, insignia or military emblem would breach the rule.[173]

4.8.4 Espionage

Article 29 of the Hague Regulations, 1907 provides:

> An individual can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not

[167] For the application of this rule in cyber operations, see Tallinn Manual, Rule 63, citing NWP 1-14, para 12.4, the UK Manual 2004, para 5.10.c and the AMW Manual, Rule 112(e).

[168] Tallinn Manual, Commentary accompanying Rule 63, para 4. If the United Nations is party to an armed conflict, misuse of its emblem by an adverse Party would constitute improper use of an enemy emblem as distinct from misuse of the United Nations emblem; AMW Manual, commentary accompanying Rule 112(e), para 3.

[169] API, Article 39(2), AMW Manual, Rule 112(c) and Tallinn Manual, Rule 64.

[170] Tallinn Manual, commentary accompanying Rule 64, para 4.

[171] Tallinn Manual, commentary accompanying Rule 64, para 5 and see for example the extract from the UK Manual 2004, referred to earlier in the text.

[172] Acknowledging the customary rules of naval warfare, the Tallinn Manual includes a customary Rule in similar terms; Tallinn Manual, Rule 65; see also AMW Manual, Rule 112(d).

[173] Tallinn Manual, commentary accompanying Rule 65, para 4.

> wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies […].[174]

Cyber espionage and other cyber information gathering operations directed at an adverse party to the conflict do not breach the law of armed conflict.[175]

Acts are 'clandestine' if they are undertaken secretly or secretively, while 'under false pretences' describes acts that are conducted in such a way as to create the impression that the individual has the right to access the information concerned.[176] If a person is outside enemy-controlled territory when he obtains information about an adversary he is not engaged in espionage. So most remotely undertaken cyber information gathering operations will not constitute espionage. Close access cyber operations, such as those necessary to obtain information from closed computer systems using, say, a memory stick, will constitute espionage if the information gatherer must act within the enemy's zone of operations provided that the other elements of espionage are present. If undertaken by a civilian, remote cyber information gathering and close access cyber espionage are likely to constitute direct participation in the hostilities and would render the person concerned liable to attack while so engaged. Close access cyber espionage is also likely to breach the domestic law of the territory where the activity occurs. If caught by the adverse Party, persons engaged in such activity are therefore liable to be tried for the relevant offences.[177]

Gaining access to the enemy's information by means of a perfidious act will only breach the perfidy rule if the perfidious act results in death or injury (or, in the case of an API State party, capture).[178] As the Tallinn Manual Commentary importantly observes:

> There is a distinction between feigning protected status and masking the originator of the attack. A cyber attack in which the originator is concealed does not equate to feigning protected status. It is therefore not perfidious to conduct cyber operations that do not

[174] The AMW Manual notes that "Espionage consists of activities by spies" and a spy is "any person who, acting clandestinely or on false pretences, obtains or endeavours to obtain information of military value in territory controlled by the enemy, with the intention of communicating it to the opposing Party"; AMW Manual, Rule 118.

[175] Tallinn Manual, Rule 66(a), AMW Manual, Rule 119. Espionage does not breach the law of armed conflict but a combatant who commits espionage loses the right to be a prisoner of war and may be treated as a spy if captured before he reaches the army on which he depends; Tallinn Manual, Rule 66(b) and as to prosecution of spies, see Solis 2010, p. 430.

[176] Tallinn Manual, commentary accompanying Rule 66, para 2 citing API Commentary, para 1779. See also AMW Manual, commentary accompanying Rule 120, para 2, where it is noted that an individual is not engaged in espionage if he is in the uniform of his armed forces while gathering the information and that members of military aircrew who wear civilian clothes inside a properly marked military aircraft are not spies.

[177] AMW Manual, Rule 121. As to the importance and legitimacy of intelligence gathering and the circumstances when it becomes espionage, see Rogers 2012, pp. 47–48.

[178] Tallinn Manual, Commentary accompanying Rule 60, para 11.

> disclose the originator of the operation.[179] The situation is analogous to a sniper attack in which the location of the attacker or identity of the sniper may never be known. However, an operation that is masked in a manner that invites an adversary to conclude that the originator is a civilian or other protected person is prohibited if the result of the operation is death or injury of the enemy[180]

or, in the case of an API state party, if the result of the operation is capture of the enemy.

In the context of a discussion of espionage and sabotage, Heather Dinniss, citing Baxter, argues that "it is primarily the act of deception for the purposes of destruction or information gathering which negates combatant status" and that "[i]n the digital age, the danger posed by spies and saboteurs to their opponents is not diminished by the lack of physical presence in the adversary's territory, which, in fact, makes it harder for the victim to detect and distinguish such attackers".[181]

It must be doubted, however, that states would yet interpret activities undertaken from outside enemy controlled territory as constituting either espionage or sabotage, but these cyber deception operations are likely to pose a legal problem which we shall now discuss.

4.8.5 The Problem

If, as seems foreseeable, future conflict is characterized by widespread, difficult to detect cyber deception operations that corrupt, or deny, the data that supports the adversary's targeting decision-making,[182] does this have legal implications and, if so, what are they?[183] The modern formulation of the law, as we have seen, focuses on perfidy, a narrowly defined notion, and on misuse of certain indicia.[184] If those limited rules are not breached, and if the activity does not amount to treacherous killing or wounding under Article 23(b) of the Hague Regulations, there is no legal rule that, in terms, prohibits cyber activities that so corrupt the opponent's

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[179] Recalling, however, that if captured, that combatant may subsequently be denied combatant or prisoner of war status.

[180] Tallinn Manual, Commentary accompanying Rule 60, para 13.

[181] Dinniss 2013, pp. 264–265.

[182] Consider for example Press Release, Chipman 2010, available at www.iiss.org/publications/military-balance/the-military-balance-2010/military-balance-2010-press-statement/ and consider Schmitt and Thurnher 2013, pp. 242–243 citing the US Department of Defense Directive 3000.09, Autonomy in Weapon Systems dated 2 November 2012.

[183] Sean Watts sees the clear potential for harm achieved by deception to undermine confidence in a vital mode of human interaction. "Security concerns and maintaining integrity of systems, connections and data now dominate cyber dialogue to the point of distraction. How the law of war will regulate deception in cyber warfare and other emerging forms of hostilities, if at all, is sure to be a critical issue"; Watts 2013, p. 9.

[184] The modern law also prohibits treachery. As to the relationship between notions of perfidy and treachery, see the discussion earlier in this chapter.

understanding of the battlespace, that so degrade the operation of his essential systems that he can either no longer prosecute effective attacks or that his ability to comply with distinction, discrimination, proportionality and precautions rules is impaired.

There is certainly an argument that cyber camouflage operations, such as an operation to introduce malware in the form of a logic bomb or a deeply embedded rootkit in a covert manner, will seek to mimic the normally civilian background cyber traffic and thus pass unnoticed to the target network or node.[185] Determining whether such an operation amounts to prohibited treachery or perfidy, in the event that death injury or, for API states, capture is thereby caused, will in part depend on whether such an operation can properly be regarded as treacherous or as feigning law of armed conflict protected status. Such activity could also only constitute prohibited treachery or perfidy if conducted during and in connection with an armed conflict[186]; the relevant act will not be prohibited perfidy, for example, if at the time when the relevant act is undertaken an armed conflict is not yet under way because no law of armed conflict protected status would then exist, so it cannot be feigned, and because at the relevant time there would be no 'adversary'.

Having noted that the combatant who chooses to hide among a crowd of civilians in order to kill, injure or capture an adversary breaches the Article 37(1) perfidy rule, Yoram Dinstein identifies what seems to be the most pertinent issue as to the distinction between perfidy and a lawful ruse when, citing D Bindschedler-Robert, he observes that "combatants may try to become invisible in the landscape, but not in the crowd".[187] So how does that sort of distinction work in the context of cyber operations? Based on current understanding, it would seem that cyber deception activity that does not involve the ingredients of perfidy or treachery can most appropriately be equated with becoming invisible in the landscape and is therefore, on Dinstein's analysis, lawful. Where, by contrast, a cyber operation is for example undertaken in such a way as to cause the adversary to have confidence that the operation has civilian protected status with the intention of betraying that confidence and where death, injury or capture of the adversary is the result of the operation, prohibited perfidy, as we have seen, will have been committed.

It is an inevitable truth that decision makers must rely on their interpretation of the available information when making targeting decisions. Imagine therefore a situation in which that information is so corrupted by enemy cyber action that those deciding on attacks will be acting on the basis of an entirely false understanding as to the operational picture and in which, due to the way the falsification has been achieved, they could not reasonably become aware of that falsity.

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185 Watts 2013, pp. 56–57.

186 Watts 2013, pp. 58–59.

187 Dinstein 2010, p. 234.

Take as an example a situation in which the deceived attacker fully complies with his Article 57 obligation to 'do everything feasible' to verify the status of a target as lawful, that the attack may be expected to comply with the proportionality rule and that the chosen method of attack and target minimize incidental civilian danger and harm. He then fires a missile believing that he is engaging the planned military objective but the missile instead attacks a school used for entirely peaceful purposes. Let us assume that the targeting of the school and of the civilians in it is attributable to the scale, nature and effects of the enemy's cyber deception activities.[188]

The legal implications can conveniently be illustrated by considering unmanned attack methods, both those with a 'man in the loop' and autonomous attack systems, both of which are clearly vulnerable to cyber interference. The obligations to take 'constant care' and to do 'everything feasible to verify' imply, in relation to unmanned operations, that once the potential for cyber interference with, for example, computer navigation links, weapons control and guidance systems, target identification software and other systems becomes evident, everything feasible will need to be done to seek to ensure those systems remain robust against the kinds of cyber interference of which the Party to the conflict is reasonably aware. There will be good military reasons for doing this, namely to ensure that the intended targets are in fact engaged. Humanitarian concerns will also be served by taking such precautions, as successful interference may cause loss of control of the weapon and consequent danger to civilians or civilian objects. Kenneth Anderson and Matthew Waxman note that the communication system between human and weapon system can be jammed or hacked and that a technological response might be to sever the communications link and cause the robot to be dependent on executing its own programming or to make it genuinely autonomous.[189]

If it is feasible to do so, it would be appropriate to design these networks and systems in such a way as to enable them to detect, and then to disclose to the operator or other person who is supervising the mission, when cyber interference occurs or when for any other reason there is an adverse effect on their performance or reliability. The 'Stuxnet' experience suggests, however, that where cyber methods are used deliberately to interfere with such systems, the methods used may be designed so as to conceal the intrusion or interference. So it is foreseeable that cyber warriors will be seeking to corrupt the picture on which targeting

[188] In a presentation given at the annual Cycon Conference in Tallinn in June 2013, the author put the issue as follows: "If increasingly pervasive cyber capabilities are so used that deception operations become the rule rather than, relatively speaking, the exception, and if as a result little or no reliance can in future be placed on the information that would traditionally support targeting decision-making, what are the consequences for the practical ability of combatants to comply with the distinction, discrimination, proportionality and precautions rules that lie at the core of targeting law? At least some concrete basis for reliable decision-making is central to the practical delivery of these protective principles. Widespread use of deception must not, it is suggested, become the cause of a slide into 'anything goes'."

[189] Anderson and Waxman 2013, p. 7.

decisions are based while keeping the adverse party's decision-makers ignorant of what is going on. In the likely resulting process of 'threat and countermeasure', interesting legal issues may be expected to arise when distorting the operational picture for an attacker who is seeking to comply with distinction, discrimination, proportionality and precautionary rules results in the attack of civilians and/or civilian objects.

Imagine that a UCAV sortie is being planned with the purpose of locating and attacking the enemy's Command HQ. Human intelligence, satellite imagery and detected ground communications signals have all been considered and lead to the reliable conclusion that the HQ is located in an identified building which is to be attacked by a missile fired from the UCAV. The UCAV system is operator-controlled. The control panel comprises screens depicting real-time images from the sensors on-board the UCAV. We can analyze a number of alternative scenarios as follows.

1. Employing a 'man in the middle' cyber operation, the enemy accesses the computer system that controls the transmission of weapon firing instructions from the operator to the on-board weapon guidance system. By virtually placing himself within that system, the enemy hacker is able to cause the transmission of target co-ordinates that do not represent the planned target, namely the Command HQ, but which are instead the co-ordinates of, say, a school with the result that the missile attacks the school and many civilians are killed and injured.

2. By undertaking an identical 'man in the middle' cyber operation, the enemy hacker places himself virtually within the computer link that places on the UCAV operator's control panel the moving image that is generated by the sensors on board the UCAV. The enemy hacker substitutes a distorted sensor feed which appears on the UCAV operator's control panel. When the UCAV operator observes the planned target, the Command HQ, on the screen that is showing the distorted feed, he commands the UCAV to fire its on-board weapon. The cyber operator has, however, deliberately distorted the fed image in such a way that the missile from the UCAV will in fact attack a school causing civilian deaths and injuries.

3. By means of a 'masquerade' cyber operation, an enemy hacker intrudes into the computer system that stores the data that has been gathered in order to inform targeting decision-making. He alters the information stored there knowing and intending that by doing so the adverse party will be caused to make erroneous targeting decisions. The false information the enemy hacker feeds into the system includes data that is to be used to plan a UCAV mission. The false information deceives the UCAV operator into targeting what he believes to be a military objective, namely the Command HQ, but which in fact turns out to be a school, the attack of which causes civilian deaths and injuries.

Foreseeably, in all of these scenarios the party to the conflict that operated the UCAV will be accused of war crimes. Fragments of the missile may be recovered from the scene of the attack and may tend to support claims that the UCAV operating party to the conflict was to blame for what occurred. Those who planned the mission may well be powerless to detect the intrusion, probably have no idea

what exactly went wrong and will likely be unable to refute allegations in the media and elsewhere either immediately or, probably, for a significant period after the event. If further UCAV attacks have similar results, the operators may be expected to lose confidence in their weapon system, weapon control system or, as the case may be, intelligence processing system, and may as a result decide not to use the relevant system further, which may of course have been one of the purposes of the cyber operation.

4. If a cyber hacker escapes detection, intrudes into and takes control of the target recognition system in an autonomous UCAV, he might, for example, reduce the stringency of the conditions that must be satisfied for the software to recognize a sensor-observed object as amounting to the military object that the autonomous UCAV has been programmed to attack. The result that the hacker intends to achieve may be that the UCAV, instead of limiting its attacks to the planned and programmed military objects, such as armoured personnel carriers or artillery pieces, will attack any vehicle, civilian or military, of a certain size. Those ordering and monitoring the mission may have no way of knowing what has gone wrong or why, because they may have no indication of the cyber intrusion, nor of the associated cyber interference. They are therefore unable to explain why the weapon starts to attack civilian objects, and are again likely to lose confidence in their own weapon, which may, again, have been the purpose of the cyber operation.

The vital factor that all of these examples have in common is the diminution of the weapon system user's ability to comply with the principle of distinction and with the discrimination rule. This may be the case even though the user of the compromised system has done all that is practically possible to verify that the objects of the attacks are military objectives and that the planned attacks will not breach the proportionality rule. Of course, in our examples the objects of the planned UCAV attacks were indeed military objectives. If detection of some kinds of cyber intrusion becomes technically feasible, satisfying the 'all feasible precautions' obligation may well involve acquisition and employment of such detection equipment, particularly if intrusion and interference of the sort we have discussed becomes a foreseeable possibility, or even a likelihood. This would, however, be subject to financial and procurement priority considerations, but is likely to be a high priority because detection and counteracting of such intrusion and interference operations is likely to be essential to ensuring that the overall military mission achieves its desired military purpose.[190]

Jean-François Quéguiner, referring to the use of such ruses as decoys by the Federal Republic of Yugoslavia during the 1999 NATO bombing campaign, asserts that such deception as to the nature of a target is lawful so long as it does not "lead the attacking commander to direct military operations against civilian

[190] This view would be based on the obligation to take all feasible, that is practical or practically possible, precautions, and on the overriding duty to take constant care to spare civilians and civilian objects.

persons or property in the genuine belief that these are military objectives".[191] This, if a correct statement of the law, would at face value appear to be a complete answer to our problem. But is it really correct? It does, after all, imply that the commander employing such ruses must consider their effect on the mind of the opposing commander in the context of that opposing commander's plan of campaign which he, the commander employing the ruses, will not necessarily, indeed which he may necessarily not, know. Furthermore, it is an interpretation that seems to be at variance with the widely accepted general statement in Article 37(2) of API that ruses of war are not prohibited. Either an act is a ruse or it is not and either a ruse is permitted or it is not.

It might at first glance appear that the answer to this problem lies in the requirement that a lawful ruse infringe no rule of international law applicable in armed conflict and must not invite the confidence of the adversary with respect to protection under the law.[192] However, acts of cyber interference that erode the utility of the enemy's targeting system are lawful operations against what on any reckoning are military objectives under Article 52(2) of API. Such operations do not per se infringe a rule of international law. Moreover, cyber deception operations that distort the enemy's picture of the battlespace do not as such invite his confidence as to protection under the law. Rather, they seek to erode his confidence as to, say, the location of the military objectives that he would like to attack, which is after all a classic example of a lawful ruse. This rather leads one to believe that current law would only prohibit such a cyber deception operation if its explicit purpose is to cause the deceived party to the conflict to attack civilians, civilian objects or persons or objects entitled to specific protection and if it directly causes that result. Cyber deception operations the purpose of which is merely to erode the confidence of the adversary as to his own targeting processes, or to cause those targeting processes to malfunction, or to cause the resulting attacks to become less reliable or accurate, would not seem to breach current law.

Where operator-controlled UCAV operations are concerned, the technical priority will therefore be:

a. to seek to ensure system robustness, but if that fails
b. to seek to ensure that the system detects the intrusion or interference, and
c. to make the operator aware of the intrusion, and
d. to make the operator aware of the effect of the intrusion on his control of the UCAV or on the accuracy of the operational picture that forms the basis of his attack decisions, and
e. to make the operator aware of the effect of the intrusion on any other system that is vital to the UCAV targeting process.

Where autonomous attack systems are concerned, the systems should be so designed that:

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[191] Quéguiner 2006, p. 799, cited with approval at Dinstein 2010, p. 240.

[192] API, Article 37(2).

a. those commanding the mission are informed of any intrusion or interference, and
b. that those commanding the mission are enabled to take appropriate action, which may
c. involve terminating the mission, or
d. diverting the platform elsewhere, or
e. altering the platform's operation so that any further platform or weapon action requires operator control.

All of this, however, rather assumes a continuing degree of control which the cyber action may have removed. If a cyber intrusion or interference operation wrests control of the platform, or at least of the weapon, from the platform's operators or commanders, liability for the associated attacks will, *prima facie* in the author's view, shift to those who have taken control of it, so an ability to be aware of loss of control and to demonstrate that fact publicly and in as timely a way as possible may be of considerable importance to the ongoing media campaign in the event of circumstances of the sort we have been discussing.

It must, however, be recalled that there are legal obligations placed on both parties to the conflict to take precautions against the effects of attacks. As we have seen, Article 58(c) of API obliges the parties to the conflict to the maximum extent feasible to take necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations. Moreover, Articles 51(2) and 52(1) of API prohibit making the civilian population, individual civilians or civilian objects the object of attack.

So if a cyber hacker acting on behalf of a party to the conflict that is subject to UCAV attack achieves control of the enemy's UCAV or its weapon and if that cyber hacker is able to direct the weapon, he effectively becomes the attacker in relation to any subsequent use by him of the weapon. It follows from this that if he exerts that control of the weapon by knowingly or intentionally directing it at civilians or civilian objects, or by knowingly or intentionally causing it to undertake an attack that breaches the proportionality rule or that targets persons or objects subject to special protection, the cyber hacker will have breached the rules prohibiting such attacks, for example in Article 51 and/or Article 52, and will therefore be guilty of the relevant war crime.[193]

If he does not achieve that degree of control of the platform and its weapons, but interferes with the way in which the platform and weapons are operated by the enemy, he cannot in the author's view be regarded as the attacker but remains bound by the obligations under Article 58. He may, however, have taken only sufficient cyber action to prevent the weapon from attacking its originally intended target. Such 'parrying' operations should not, it is suggested, cause the cyber hacker to be regarded as the attacker. Accordingly, if the hacker limits himself to such 'parrying' action, he should not thereby be deemed to have breached Article 51(2) or 52(1), for example, if the effect of the 'parrying' operation is that the missile impacts on civilians or civilian objects. This is because, while the notion of

[193] As to the relevance of knowledge or intent, see Rome Statute, 1998, Article 30(1).

'attack' in Article 49 of API encompasses any use of violence against the adversary, a parrying action of the sort being discussed involves a redirection of the violence of the other party away from its intended object, rather than directing that violence positively towards a person or object that the cyber hacker has decided should be attacked.

It is appreciated, however, that fine distinctions are being drawn here based on the intent of the cyber hacker, an intent which it is likely to be difficult to establish. If a cyber hacker intrudes into a UCAV weapon's precision guidance system and so reduces that system's reliability that it will foreseeably cause the weapon to attack military objectives or civilians or civilian objects without distinction, such action is liable to be characterized as a failure to take constant care to spare those civilians and civilian objects.[194] Tony Rogers argues in the context of conventional military operations that

> a tribunal considering whether a grave breach had been committed [by an attacker] would be able to take into account, when assessing the criminal liability of the attacker in respect of any death or injury to civilians, the extent to which the defenders had flouted their obligations to separate military objectives from civilian objects and to take precautions to protect the civilian population.[195]

This view, which must be correct, applies with equal force to the circumstances discussed in this Section. Whether a defendant UCAV operator, or the state that employs him, will ever be able to establish that an enemy cyber hacker has caused the erroneous attack by flouting his obligations in the manner discussed in this Section remains to be seen. Nevertheless, for the hacker actually to be regarded as the attacker in such circumstances will depend on whether he has become the initiator of the attack as it ultimately transpires.

The fineness of the distinctions can be summarized in the following propositions.

First, if the cyber hacker's degree of control enables him knowingly or intentionally to direct the weapon, or knowingly or intentionally to cause the autonomous system to direct it, at a target or category of targets of his choice, he becomes the attacker and is legally liable for the consequences.

In the *second* proposition, the degree of control referred to in the previous paragraph is not achieved, but the cyber hacker nevertheless adversely affects the reliability of the UCAV's weapon firing or guidance systems, or the target recognition software of an autonomous UCAV system, with the expectation and effect, by doing so, of causing the weapon to attack civilians, civilian objects, persons or objects entitled to specific protection or to undertake indiscriminate

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[194] If the civilians or civilian objects that are imperilled by such operations are within the control of the party employing the cyber deception operations, such operations may also breach the API Article 58(c) obligation to "take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."

[195] Rogers 2012, p. 170.

attacks. If the cyber hacker can properly be regarded as having caused the weapon to be directed towards objects or persons of his choosing, it would seem that the cyber hacker should be held responsible for the consequences of the resulting attack. If the cyber operation foreseeably causes the adverse party's attack(s) to become indiscriminate[196] the cyber operation may, depending on the circumstances, conflict with the obligations under Articles 57(1) and 58(d) of API. A careful evaluation will be required of the degree of control of the weapon that the cyber hacker exercises.

Third, there is the cyber attacker who interferes with the weapon's guidance system intending merely to deflect the weapon from its intended target. His focus is not on where the weapon will impact but, rather, on seeking to ensure that it does not impact on the chosen target. He would not seem as a result to incur responsibility for any injury or damage that the weapon may cause because he is not taking over directional control of the weapon with a view to using it as his weapon. The act of a cyber hacker who acts in this way seems difficult to equate with the 'acts of violence' language employed in Article 49(1) of API. Accordingly, the cyber hacker limiting himself to such 'warding off' action does not incur the responsibilities of an 'attacker', but must consider his responsibilities under Article 58 of API.

Fourth, if a cyber operation is used to convey false information to the enemy, or to falsify the enemy's operational picture, as to the military posture, military strength, military plans, capabilities or certain other data[197] relating to the party employing the cyber operation, such activity will not be rendered unlawful by virtue only of the use of computers to perpetrate it.

Fifth, if cyber methods are used to invite an adversary's confidence that he is entitled to receive or is obliged to accord protection under the law of armed conflict, and if death, injury or for states party to API, capture is the result of the betrayal of such confidence, the war crime of perfidy will have been committed.

Sixth, if by treacherous methods persons belonging to the hostile nation or armed forces are killed or wounded, such a cyber operation is unlawful whether or not it also amounts to prohibited perfidy under Article 37(1) of API.

Seventh and finally, if cyber methods are used to engage in activity referred to in Article 38 or 39 of API, the relevant rule will have been breached notwithstanding that it is a cyber activity that has been employed to do so. It is unclear whether using the domain name of a corresponding organization or entity would breach the rule in circumstances in which the relevant flag, emblem or insignia is not actually depicted.

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[196] As that term is understood in API, Article 51(4).

[197] This reference is limited to data the feigning of which would constitute a ruse of war. Specifically it excludes data, information, symbols, emblems, etc., the misuse of which is prohibited, for example, by Article 38 or 39 of API.

4.9 Artificial Learning Intelligence

As we have noted, the fielding of artificial intelligence, in the form of what we have called simple autonomous attack technology, has already occurred in the maritime environment and seems likely to be employed more widely, specifically in airspace, in the medium future.[198] The next major evolutionary step in the conduct of hostilities thereafter seems likely to consist of the development of Artificial Learning Intelligence (ALI) as a necessary ingredient of complex autonomous systems. Existing systems involve sensors based on platforms in airspace and on satellites in outer space recording activities in a geographical area of interest with a view to determining patterns of life that can then help to inform man-made decisions as to when, where, by what means and by which method an attack will take place. Similarly, simple autonomous attacks consist of a machine deciding upon attacks when criteria fed into the weapon control system by personnel are met.

The 'learning' aspect of ALI would involve the machine taking the mechanization process a stage further. Thus, the machine will develop its own criteria for recognition based on observations that it may make in the battlespace. Equally, the machine may observe the pattern of life in the area of interest and may then adjust a target list fed into it in advance of the mission to take account of the observations that it has made.

Clearly, such developments may, in one form, enable the autonomous technology to react appropriately, for example, to the absence of the target from the location scheduled for an attack by refraining from the planned attack, although simple autonomous systems can also achieve that because they will only attack when they recognize the presence of the object they have been programmed to engage. ALI may, however, also enable the machine to detect that a planned attack would no longer comply with the discrimination rule, if for example it is able to detect the arrival of hostages in such numbers that the resulting civilian loss of life may be expected to be excessive. Perhaps less ambitiously, the autonomous technology may be expected to detect whether there has been a material change in the circumstances pertaining in the area of search compared to that suggested by the pattern of life data that was fed into the mission control software in advance of the mission; in that event, the autonomous search for targets would be called off.

There is a current and significant controversy between those who consider that elements of ALI will incrementally be employed in armed conflict and who suggest the need to regulate or control such activity to ensure it complies with established norms and those who propose that autonomous technology should be banned as such in warfare. Peter Asaro takes the view that

[198] Current UK doctrine describes true artificial intelligence, or as the term is used in the present Chapter 'complex autonomy', as a machine having a similar or greater capacity to think like a human. Describing such a development as a game changer in the military environment and elsewhere, development of such artificial intelligence was considered unlikely before 2021; JDN 2/11 at para 623.

> an international ban on autonomous weapon systems can be firmly established on the principle that the authority to decide to initiate the use of lethal force cannot be legitimately delegated to an automated process, but must remain the responsibility of a human with the duty to make a considered and informed decision before taking human lives.[199]

The better view is, however, that an outright ban is inappropriate and that existing law should be applied to this as to any other technology in warfare.[200]

Ken Anderson and Matthew Waxman argue that autonomous weapons technologies will develop incrementally whereas Peter Asaro sees such a method of development more in terms of a slippery slope leading to what he argues is an unacceptable result.[201] Noel Sharkey cites a number of issues as the basis for his argument that the morally correct course of action is to ban autonomous lethal targeting by robots. He notes, for example, that they lack adequate sensory or vision processing systems for separating combatants from civilians or for recognizing wounded or surrendering combatants.[202] Of course, a truly autonomous system that lacks the ability to separate in this way is unlikely to be capable of autonomous use in conformity with the principles of distinction, discrimination and proportionality and should therefore be rejected on that basis by those reviewing it under Article 36 of API or the equivalent customary law weapons review arrangements.

Second, Noel Sharkey contends that we do not have a definition of a civilian that can be sufficiently translated into computer code.[203] Again, if the current state of technology does not permit the principle of distinction to be complied with using the technology in question, that will require a weapons review decision that the technology shall not be fielded. It does not, however, necessarily follow from this that computer code cannot in the future be developed that will adequately reflect our understanding of 'civilians'.

Third, Noel Sharkey contends that, irrespective whether autonomous platforms have adequate sensing mechanisms to detect the difference between civilians and uniform-wearing military, they would still miss battlefield awareness or common sense reasoning to assist in discrimination decisions.[204] Certainly such machines will lack the *je ne sais quoi* that the human brain contributes, but it would not be

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[199] Asaro 2012, p. 689 and for the arguments in favour of a ban, see for example Human Rights Watch, Losing Humanity: The Case against Killer Robots, November 2012, available at www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf.

[200] See Anderson and Waxman 2013, Schmitt 2013, available at SSRN: http://ssrn.com/abstract=2184826 or 10.2139/ssrn.2184826. See also Schmitt and Thurnher 2013 where it is persuasively argued that an outright ban of autonomous weapon systems such as is being sought by Human Rights Watch would be premature. "Perhaps even more troubling is the prospect that banning autonomous weapon systems altogether based on speculation as to their future form could forfeit their potential use in a manner that would minimize harm to civilians and civilian objects when compared to non- autonomous weapon systems"; see Schmitt and Thurnher 2013, p. 234.

[201] Asaro 2012, pp. 706–707.

[202] Sharkey 2012, p. 788.

[203] Sharkey 2012, p. 789.

[204] Sharkey 2012, p. 789.

right at this stage to exclude the possibility that future development and testing will enable such machines to contribute other, compensating (or perhaps more than compensating) attributes to decision-making. It should be borne in mind that the autonomous system may be countering a threat that is diverse, rapid and that has the potential to overwhelm the human decision-making cycle, or at least adversely to affect the quality of human decision-making. To prohibit the only effective response system is likely to be unacceptable to states, given that there is likely to be no legal basis for seeking to prohibit the threat that is being countered.

Next, Noel Sharkey points out that robots do not have the situational awareness or agency to make proportionality decisions. He notes that hard proportionality decisions include whether to use lethal or kinetic force and the human qualitative and subjective decisions implicit in applying the proportionality test. Until technology develops to a point at which autonomous systems are capable of applying the principles of distinction, discrimination, proportionality and precautions as set out in API, they can only be used in circumstances where those initiating the mission can limit the options available to the machine to attacks that will inevitably comply with the targeting law rules. The classic example is a narrowly prescribed area and time of search within an isolated and unpopulated area of desert, seeking high value military objectives.

Finally, Noel Sharkey argues that a robot has no agency, moral or otherwise, and cannot therefore be held accountable for its actions.[205] The author would agree but contends that this is no reason to ban the technology. States will remain responsible for the decision to procure the technology and for the associated obligations to test and evaluate it before acquiring and fielding it. The engineers, computer programmers and technicians will be responsible for their management of the systems, very much as they are responsible for their management of existing, frequently complex and often, to a greater or lesser degree automated weapon systems, and commanders will be responsible for how they employ the new weapon systems in battle. The chain of accountability would seem to be clear. The responsibility will rest with procurement staffs only to procure weapon systems that, following appropriate testing, are found to comply with the existing law applicable to the state in question. The responsibility is on the lawyers accurately to advise those making procurement decisions as to whether the employment of the weapon would, in some or all circumstances, be prohibited to the procuring state. The responsibility rests with the engineers, technicians and others that manage the weapon system to ensure that it is set up in such a way that planned uses of it will be lawful. The responsibility rests with planners and commanders to so acquaint themselves with the characteristics of the weapon system, and with the constraints imposed by the applicable law, to ensure that it is in fact used in a lawful manner.

Autonomous technology does not yet seem to have reached maturity. However, to ban all such technology at this stage on the basis that, in its current less than

[205] Sharkey 2012, p. 790.

mature state it cannot meet the stated criteria is to fail to acknowledge the possibility that with further work, probably over a considerable period, the technology may indeed be able to meet the stated requirements.[206]

Cyber operations might be directed against ALI for example to cause the machine to forget its lessons, or to alter the lessons, or to simply over-ride the lessons. The effect would, from a legal perspective, likely be similar to the legal consequences of the cyber attack of operator-controlled UCAV and simple autonomous UCAV technologies that we have discussed earlier in the present Chapter. So, if the effect of the cyber attack on the ALI is to cause the cyber hacker to become the attacker, for example by placing the cyber hacker in the position essentially of determining what object(s) or person(s) the autonomous system will decide to attack, then the cyber hacker will have assumed the legal responsibilities associated with undertaking attacks. In short, the differing classes of what we have described as deception operations, if undertaken against ALI, would seem to have a similar set of legal consequences to those discussed earlier.

Equally, those developing and fielding ALI technologies would seem to have certain responsibilities. They should make them as robust as possible against cyber intrusion and interference. This will be required both in order to seek to ensure that the technology achieves its intended military purpose and in order to seek to prevent its unlawful use, for example due to hacking operations of the sort discussed in this Chapter. They should also place appropriate limits on what the learning part of the system is permitted to learn. These limits must be designed to ensure that the whole ALI process remains properly controlled by personnel and that the spectre of machines running amok is not realized. If learning can be effectively limited to enabling the machine to ensure with improving reliability that it only undertakes lawful attacks, this will be a positive aspect when the evaluation of the technology is undertaken by a state contemplating its acquisition.

Ultimately, it will be the ability or otherwise of ALI systems to comply with all of the targeting law rules as currently understood that will determine their acceptability. It is unlikely that it will be possible, for the foreseeable future, for mechanical processes to undertake the numerous evaluative decisions required of attackers by targeting law to standards of reliability that will be legally acceptable. However, simple autonomy will become increasingly vital, particularly where human reaction times preclude effective responses to rapid and/or overwhelming threats. Where complex autonomy is concerned, we must wait and see what science can do, mindful that the existing law should and indeed must define what will be acceptable.

[206] Noel Sharkey does, however, draw what the author regards as the vital and correct distinction, namely between robots being used ethically (what he describes as 'operational morality') and robots being ethical (or 'functional morality'); Sharkey 2012, p. 794.

4.10 Conclusion

It is foreseeable that automation of attack decision-making will become an increasing feature of future weaponry, and considerable research effort is currently being devoted to the evolution of simple and complex autonomous attack technologies. These developments are arousing significant controversies, both from a legal and an ethical standpoint. Legal concerns about complex autonomy centre on numerous issues. These include concern that notions of responsibility in attack will become blurred as autonomous technologies appear to delegate critical decisions to the machine. This chapter does, however, seek to argue that human beings will continue to determine whether a particular weapon shall be procured, that they will be responsible for testing it, that they will command and plan the operation in which it is to be used, that they will develop the computer programmes that the machine uses to identify targets, that they will feed mission essential data into those programmes, that they will evaluate all available information as what is going on in the battlespace and that they will determine by reference to that data whether the mission should proceed.

The mechanization of evaluative decision-making raises particular, and arguably even more difficult, legal problems, suggesting as it does that for the foreseeable future it will be necessary for a person to be in a position in real time to cancel both simple and complex autonomous attack operations if the need should arise. It follows from this that, while the weapon system may, technically, be capable of operating autonomously, it will for legal reasons be necessary to keep a human being sufficiently in the loop to be able to observe what is taking place and, if necessary, to over-ride autonomously reached attack decisions. The reference here to 'sufficiently in the loop' means that the location of the person concerned, the equipment at his disposal, his connectivity, his authority and his workload must be such that he can properly exercise a supervisory function, and can take appropriate action should the need arise to cancel the attack. It will be critically important to ensure that any use of these new technologies is in full compliance with the principles of distinction, discrimination and proportionality and with all of the rules as to precautions in attack.

The operational picture is likely in future to become much more confused as a result of the use of a broad range of cyber deception techniques. The fog of war, in short, is likely to become denser but, to continue the analogy, observers and decision makers will frequently be operating under the false appreciation that their picture of what is going on is clear and reliable. The use of cyber methods to commit perfidious attacks and thereby cause death, injury or, for states party to API, to capture enemy personnel is and will remain prohibited. Ruses of war of the sort discussed in the literature will remain lawful. The prohibition of the misuse of certain emblems, images and other indicia referred to in Articles 38 and 39 of API will also apply in the case of cyber operations by prohibiting the misuse of such emblems and indicia by cyber means.

However, the development of cyber intrusion and manipulation capabilities and the concurrent evolution of unmanned, operator-controlled and autonomous technologies raise potential legal issues, the detail of which will depend on the exact characteristics of the new technology, its capabilities and vulnerabilities. The law is clear that all those involved in military operations during armed conflict must comply with the 'constant care' duty. We seem to be entering an era when it is even less appropriate than hitherto to leap to early conclusions as to who or what was or may have been at fault when unsatisfactory attacks occur. Accurate allocation of responsibility may well require months of painstaking research and this suggests that managing media and public interpretations of potentially catastrophic events is likely to prove even more challenging than at present.

The intricate legal rules as to attribution are compounded by the practical difficulty in determining exactly who undertook a particular cyber activity using which machine from which geographical location. Information may be lacking or ambiguous on any or all of these matters. Even if the identity of the actor and the nature and location of the relevant computer are established, it may be difficult to determine, and then to obtain evidence to show, that any particular state or other entity was involved.

This quality of anonymity has important potential consequences for the current and likely future uses of cyberspace by national security agencies. While deception always was an important part of warfare, it is legitimate to ponder whether systemic deception that undermines the practical application of the distinction principle is consistent with the obligation to take 'constant care'. It is, perhaps, only when the full capability of the new and emerging technologies has been clarified that a sensible answer to this question is going to be forthcoming. If the technology enables victims of cyber deception operations to be aware of what is going on, this may be an important factor. At face value, however, undertaking cyber deception operations that will foreseeably put civilians and civilian objects at enhanced risk would seem to be difficult to reconcile with the obligations to take constant care and the related obligation to take necessary precautions to protect the civilian population against the dangers resulting from military operations.

More generally, using machines increasingly in warfare as a substitute for humans thus significantly diminishing the associated risks to friendly forces raises complex ethical issues as to the nature of armed conflict. As Peter Singer eloquently puts it,

> [e]ven if the nation sending in its robots acts in a just cause, such as stopping a genocide, war without risk or sacrifice becomes merely an act of somewhat selfish charity….The only message of 'moral character' a nation transmits is that it alone gets the right to stop bad things, but only at the time and place of its choosing, and most important, only if the costs are low enough.[207]

[207] Singer 2011, p. 351.

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Chapter 5
Weapons Law and Future Conflict

Contents

5.1 Introduction

Technological advance in weaponry seems to be unstoppable. Anyone viewing the evolution of warfare over the centuries, indeed the millennia, must be struck by the way in which technology has influenced, even determined the manner in which warfare is conducted. Consider for example the development of the longbow, Key was the type and placement of its constituent material, located at the heart of the yew tree. "[W]ithin a yew log, rightly cut from the tree, are the natural components of a 'self-composite' weapon, the perfect natural material to resist tension,

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_5,

the sapwood, lying next to the perfect natural material to resist compression, the heartwood."[1] The power derived from the thickness of the section. To counter brittleness, increases in girth had to be accompanied by increases in length, hence the name. It is assessed that the most powerful such bow used at Agincourt was probably 6′4″ in length with a draw of 120 lb or 54 kg.[2] A skilled bowman could fire up to 12 arrows per minute, each capable of piercing mail and, at short range, plate.[3] A narrow fronted killing zone would be established approximately 200 yards deep into which several thousand arrows would be fired at 10 seconds intervals.[4] Charging into such a zone on horseback had the predictable disastrous consequences for the French knights in Crécy in 1346, in Poitiers in 1356 and in Agincourt in 1415. O'Connell demonstrates the catastrophic consequences the longbow had for the fundamental modus operandi of the knights and concludes that the longbowman was a portent of things to come, in that, along with Genoese crossbowmen and Pisan mercenaries, he "succeeded in significantly undermining the basic Western animus against killing at long range".[5]

More recently, the development of the tank had a profound effect on the conduct of land warfare. First used by the British in small numbers in 1916 on the Somme to no particular effect, approximately 400 tanks were used to attack the Hindenburg Line at Cambrai in November 1917 and during a 2-day battle a 6 mile salient was driven into German territory, representing an unparalleled advance. Similar gains were repeated on 8 August 1918.[6] During the inter-war years, tank technology was refined and the development of the new 'panzers' was an important factor enabling the move to more modern, mobile forms of warfare during World War II.

There are any number of additional examples of technological developments that have driven changes in the way in which hostilities are conducted, ranging from the introduction of the submarine, the employment of asphyxiating gas, attacks of surface targets by means of military aviation, the use of high velocity rifles and missiles, the introduction of enhanced blast munitions and the development of the atom bomb. It would be a brave suggestion that technological advance is now suddenly going to stop. Indeed, all the indications are that technological development will accelerate rather than decline, and Eric Jensen has identified a number of what he describes as 'waning factors' that seem likely to be features of that process. He considers 'breathable air zones' to be of diminishing significance, as means and methods of warfare such as miniaturization and robotics are developed that do not rely on man's ability to breathe. Geographical considerations are also waning, in the sense that other means of association, such as global social networking, lessen "the perceived binding nature of geographical affiliations"; the centrality of the State in

[1] Hardy 1976, p. 30.
[2] O'Connell 1989, p. 103.
[3] Hurley 1975, p. 22.
[4] Keegan 1976, pp. 92 and 98.
[5] O'Connell 1989, p. 104.
[6] O'Connell 1989, p. 266.

matters linked to sovereignty and consent as the basis for extra-territorial action may also, he argues, be diminishing in importance.[7]

Law does not tend to anticipate the process of technical advance. Rather, it lags behind but that is not a criticism of the law. Indeed, it is inevitable that there should be a delay between the appearance of a new weapon technology and the formation of legal provisions to address any concerns that the technology may arouse. States cannot necessarily know in advance what scientific endeavour will produce, nor can they always anticipate with any degree of reliability what humanitarian or other concerns, if any, the practical application of such technologies in the weapons field will generate. Equally, the advantages and opportunities that new technology will offer in the battlespace can only become clear once development has achieved a sufficient maturity and after the resulting product or capability has been appropriately tested.

So described, the reader might be left with the impression that we are all at the mercy of what science will produce, and that nothing can be done to limit the introduction of new technologies that may be expected to have the most dreadful consequences. That would not, however, be an entirely accurate appreciation. The law of armed conflict does address these very issues by requiring that States assess the lawfulness of new weapons before fielding them. The yardstick against which the assessment must be conducted is, as we shall see, current law. Although relatively few states are known to have systematic procedures for the practical implementation of this customary law obligation, the fact remains that States have a duty to consider whether new weapons they plan to acquire or to field would breach international law rules by which they are bound. That, of course, leaves open the issue of entirely new weapons technologies for which there may be no ad hoc provision in the current law of armed conflict. In those cases, it is inevitable that the law will lag behind scientific progress.[8]

The purpose of this chapter is therefore to look at the law of weaponry as it stands in the early twenty-first century and to ask whether it is well placed to address the challenges that new technology seems likely to pose. The logical starting point for such an analysis is to determine what rules of the law of armed conflict apply to weaponry and this is what we will do in the next section. In Sect. 5.5, basing ourselves on those rules, we will describe the criteria against which the lawfulness of weapons can properly be assessed. In Sect. 5.3 and Sect. 5.4, we will look at the obligation that States have to undertake such assessments in relation to new weapons, means or methods of warfare. In Sect. 5.6, we will consider four

[7] Jensen 2013, pp. 5–6.

[8] Consider, however, the suggestion that formalized review mechanisms, such as that provided for in Article 36 of API, should be a focus of civil society attention as part of efforts to strengthen standard-setting in relation to emerging military technologies; Rappert et al. 2012, p. 765. Noting the limitations that consensus requirements impose on the use of the CCW mechanism for such development, the authors see civil society focusing on framing concerns around specific weapons, which rather reflects what we have seen in recent years in relation, for example, to anti-personnel landmines and cluster munitions.

technologies or methods of warfare that seem likely to see substantial technical development in the coming decades, applying to each the review criteria that we have discussed and identifying in relation to each some of the issues that a person conducting a legal review involving such technologies will likely need to consider. In Sect. 5.7, we will note how weapons law applies differently across the spectrum of conflict and shall consider how the evolution of that spectrum that we contemplated in Chap. 2 will affect the law of weaponry, if at all. In the final section, we will seek to draw conclusions.

5.2 Law of Armed Conflict Rules that Apply to Weaponry

It is always going to be challenging to summarize the whole of the law of weaponry in a section of a chapter, so in what follows we will limit ourselves to the rules that are likely to be of greatest relevance to the legal review of new technologies such as those referred to later in this chapter and will try to avoid any unnecessary detail. We will start by looking at the customary law principles and the rule, derived from Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API 1977), that addresses environmental protection before finally reviewing the particular rules that address specific weapons or weapons technologies. Before embarking on that discussion, however, we should note a more general principle reflected in API as follows: "In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited."[9] It is the specific principles and rules that we will now consider, however, that define the limits to which reference is made here. The precise language of the treaty definitions and of the treaty obligations is of particular importance, reflecting as it does the extent of the prohibitions and restrictions that states were prepared to accept.[10]

5.2.1 The Customary Weapons Law Principles

The superfluous injury and unnecessary suffering principle is one of the cardinal principles in the law of armed conflict and, thus, of the law of weaponry.[11] It is customary in nature and thus binds all States and has its roots, inter alia, in certain

[9] API, Article 35(1) and see Oeter 2013, pp. 121–125.

[10] As to the tendency of language to reflect a state's intent and political purpose, see Bentley 2013, pp. 96–97.

[11] ICJ Nuclear Weapons Advisory Opinion, paras 74–87.

nineteenth Century Declarations and in treaties adopted in 1899 and 1907.[12] Its modern formulation prohibits the employment of "weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".[13]

The words 'superfluous' and 'unnecessary' are relative concepts and of necessity involve a comparison. The wording of the principle makes it clear that the wounding effect, other injury and suffering associated with the use of the weapon are involved in the comparison but does not specify what these are to be compared with. Recognizing that the purpose in using a weapon is to secure for the user a military advantage, the obvious comparator is the general military advantage or utility to be derived from using the relevant weapon in the kinds of circumstance in which it is designed or intended to be used.

> The legitimacy of a weapon, by reference to the superfluous injury and unnecessary suffering principle, must be determined by comparing the nature and scale of the generic military advantage to be anticipated from the weapon in the application for which it is designed to be used, with the pattern of injury and suffering associated with the normal intended use of the weapon.[14]

5.2.2 *Indiscriminate Weapons Rule*

The second customary principle of the law of weaponry prohibits weapons that are indiscriminate by nature. Article 51(4)(b) and (c) of API set out the widely accepted formulation of this rule by providing that prohibited indiscriminate attacks include

> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

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[12] See for example St Petersburg Declaration, 1868, preambular paras 3–6, Brussels Declaration, 1874, Article 12 and Hague Regulations 1899 and 1907, Article 23(e). The early workings and development of the rule are discussed at Boothby 2009, pp. 55–58; see also Solis 2011, pp. 269–272.

[13] API, Article 35(2).

[14] Boothby 2009, pp. 63. See also Fenrick 1990, p. 500: "A weapon causes unnecessary suffering when in practice it inevitably causes injury or suffering disproportionate to its military effectiveness. In determining the military effectiveness of a weapon, one looks at the primary purpose for which it was designed." See also the discussions at Oeter 2013, pp. 125–126 and at Dinstein 2010, pp. 63–67.

(c) those which employ a method or means of combat the effects of which cannot be limited as required by th[e] Protocol; and [which], consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.[15]

It should be noted that in 1985 Frits Kalshoven reported that, at the commencement of the negotiation of API, not all experts were prepared to acknowledge that a rule prohibiting identifiable 'indiscriminate weapons' had "acquired the status of a rule of positive international law".[16] There had been no previous explicit provision of conventional law prohibiting weapons that are indiscriminate by nature, and it could therefore be argued that the provision in Article 51(4)(b) and (c) was a new rule to which the nuclear statement made by the UK and other NATO states would apply.[17]

5.2.3 *Weapons Rules Protecting the Environment*

There are two sets of rules that address the impact of weapons on the natural environment. The first of these addresses the use of the environment itself as a weapon by prohibiting States party to "engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party".[18]

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[15] Yoram Dinstein discusses this rule under the heading of the principle of distinction, an approach which is of course entirely proper as the discrimination rule in Article 51(4) of API is an important element in compliance with the principle of distinction; see Dinstein 2010, p. 62. The V2 rockets used to attack the south of England commencing in September 1944, their predecessor the V1 rocket and certain Scud missiles would be examples of weapons that would breach this rule. Additional examples would be many of the improvised rockets fired from Gaza into Israel in recent years; see Scobbie 2012, p. 307 and see UN Envoy Condemns Rocket Firing From Gaza, Calls for Restraint by Israel, UN News Centre 2013, 3 April, available at www.un.org/apps/news/story.asp?NewsID=44547#.UYU8UpX3Crc.

[16] Kalshoven 1985, p. 236.

[17] Boothby 2009, pp. 83–84. Under that statement, the UK expressed its understanding that the rules introduced by the Protocol apply exclusively to conventional weapons and do not have any effect on and do not regulate or prohibit the use of nuclear weapons; Statement (a) made on ratification of API by the UK on 28 January 1998.

[18] Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Geneva, 2 September 1976 (ENMOD), Article I. The term 'environmental modification techniques' refers to "any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space"; Article II. Note the additional obligation at Article I(2) not to assist, encourage or induce activities that breach this provision. For a more detailed consideration of the ENMOD Convention, see Dinstein 2010, pp. 198–202.

The term 'widespread' can be interpreted as "encompassing an area on the scale of several hundred square kilometres", while 'long-lasting' seems to involve "lasting for a period of months, or approximately a season" and 'severe' involves "serious or significant disruption or harm to human life, natural and economic resources or other assets".[19] A clear example of an activity that would amount to environmental modification would be an attempt to modify the weather, for example, by increasing or reducing rainfall in order to cause floods or drought.[20]

The second set of rules protecting the natural environment in times of armed conflict bind states party to API and prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".[21] Somewhat more specifically,

> [c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.[22]

The criteria 'widespread, long-term and severe', though similar to those referred to in ENMOD, are not identical and whereas any one of the ENMOD criteria suffices for there to be a breach of that rule, the API criteria are cumulative, with the obvious result that if any one of them is not present, the API rule is not broken. None of the API criteria is defined. It is clear, however, that their effect, taken together, is such that only the most serious of damage will breach the rule.[23] The most important point of distinction between the ENMOD rule and those in API is, however, that ENMOD is concerned with the use of the environment as a weapon, whereas the API articles are dealing with the collateral, damaging effect

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[19] Conference Understanding relating to Article I, available at the ICRC treaty database at www.icrc.org.

[20] Rowe 1987, p. 117. A further Conference Understanding indicates that the possible results of such techniques may include earthquakes, tsunamis, upset in the ecological balance of a region, changes in weather and climate patterns; Conference Understanding relating to Article II, available at the ICRC treaty database at www.icrc.org.

[21] API, Article 35(3).

[22] API, Article 55(1).

[23] "The time or duration required (i.e. long-term) was considered by some to be measured in decades. References to twenty or thirty years were made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition….It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision. What the article is primarily directed to is thus such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems"; Rapporteur's Report CDDH/215/Rev.1 para 27 reported in ICRC Commentary, para 1454.

on the environment of an attack that has someone or something other than the environment as the object of the attack.[24]

5.2.4 Weapons Law Rules on Specific Weapons or Technologies

The law of armed conflict includes specific rules prohibiting or restricting the use of particular weapons types. In order to provide a satisfactory basis for the discussion that follows, the specific rules are set out in summary form below. It should be appreciated that inevitably numerous points of detail, including a significant number of associated rules, have been omitted in the interests of appropriate brevity.[25]

There is a general prohibition of the use of poison or poisoned weapons,[26] and of the use in war of asphyxiating, poisonous or other gases, all analogous liquids, materials or devices or bacteriological methods of warfare.[27] Bullets that expand or flatten easily in the human body cannot be used in international armed conflicts and, as we shall see later in this chapter, are similarly prohibited in most circumstances in non-international armed conflicts; the use of explosive or incendiary bullets designed solely for use against personnel is prohibited in both international and non-international armed conflicts.[28]

Fragmentation weapons whose primary effect is to injure by fragments which in the human body escape detection by X-rays cannot be used.[29] There are two

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[24] For discussions of the API and ENMOD environmental protection rules, see Oeter 2013, pp. 126–129 and Dinstein 2010, pp. 202–206 and for an appreciation of the dissimilarities between the ENMOD and API provisions, see Dinstein 2010, pp. 209–212 and Rogers 2012, pp. 218–220, where it is observed that ENMOD applies to damage caused in another state whereas Articles 35(3) and 55 of API can apply to damage in one's own state, on the high seas or in Antarctica; that ENMOD appears to be absolute whereas for the API rule to apply, the consequences must have been intended or foreseen; and that ENMOD applies to any hostile use whereas API applies only in armed conflicts and hostile occupations. For the application of the environment rules to particular weapons technologies, see Rogers 2012, pp. 221–225 and in relation to particular categories of target, see pp. 226–234.

[25] For a more detailed consideration of these matters (see Hays Parks 2005 and Boothby 2009).

[26] Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863, Article 16; Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention II, 1899 and to Hague Convention IV, 1907, Article 23(a) and see Dinstein 2010, pp. 68–69.

[27] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

[28] Joint Service Manual of the Law of Armed Conflict, 2004 Edition, UK Ministry of Defence (UK Manual 2004), paras 6.9 and 6.10 and see Dinstein 2010, pp. 69–70.

[29] United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980 (CCW), Protocol on Non-Detectable Fragments, Geneva, 10 October 1980 (Protocol I).

Protocols, namely Protocol II and Amended Protocol II to CCW, that address mines,[30] booby traps[31] and other devices.[32] Protocol II, adopted in 1980, contains provisions that essentially reflected relevant military doctrine whereas the Amended Protocol includes more prescriptive rules and adjusts some of the definitions. Article 6 of Protocol II prohibits any use of a booby-trap "in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached".[33] Also prohibited is the use of booby-traps

> in any way attached to or associated with:
>
> (i) internationally recognized protective emblems, signs or signals;
> (ii) sick, wounded or dead persons;
> (iii) burial or cremation sites or graves;
> (iv) medical facilities, medical equipment, medical supplies or medical transportation;
> (v) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
> (vi) food or drink;
> (vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
> (viii) objects clearly of a religious nature;
> (ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> (x) animals or their carcasses.[34]

Amended Protocol II to CCW prohibits mines, booby-traps or other devices that use a mechanism or device that is specifically designed to detonate the munition by the presence of commonly available mine detectors due to their magnetic or other non-contact influence during normal use in detection operations.[35] Also prohibited are self-deactivating mines equipped with an anti-handling

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[30] "Mine means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle"; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Geneva, 10 October 1980 (Protocol II), Article 2(1).

[31] A booby-trap is "any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act"; Protocol II, Article 1(2) and Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, Geneva, (Amended Protocol II), Article 2(4). As to the Amended Protocol, see Petrarca 1996.

[32] "Other devices means manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time"; Protocol II, Article 1(3). Amended Protocol II altered the definition to read "Other devices means manually emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time"; Amended Protocol II, Article 2(5).

[33] Protocol II, Article 6(1)(a).

[34] Protocol II, Article 6(1), Amended Protocol II, Article 7(1).

[35] Amended Protocol II, Article 3(5).

device that is so designed that the anti-handling device is capable of functioning after the mine can no longer function.[36] Non-detectable anti-personnel mines produced after 1 January 1997 are prohibited. To be detectable they must incorporate a material or device that enables the mine to be detected by commonly available technical mine detection equipment and provides a response signal equivalent to a signal from 8 gm or more of iron in a single coherent mass.[37]

The Amended Protocol also prohibits remotely delivered anti-personnel mines if they do not comply with certain technical self-destruction and self-deactivation requirements[38] and remotely delivered mines which are not anti-personnel mines, unless, if feasible, they have an effective self-destruction or self-neutralization mechanism with a back-up self-deactivation feature, so designed that the mine will no longer function as a mine when it no longer serves the military purpose for which it was placed in position.[39] The final Amended Protocol II prohibition concerns booby traps or other devices that are attached to or associated with any of the objects listed in Article 6 of Protocol II[40] and "booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material".[41]

Protocol III to CCW prohibits making military objectives located within a concentration of civilians the object of attack by air-delivered incendiary weapons. Making a similarly located military objective the object of attack by non-air-delivered incendiaries is only permissible if the military objective is clearly separated from the concentration of civilians and all feasible precautions are taken to limit the incendiary effects to the military objective and to avoid or minimize loss of civilian life, injury to civilians and damage to civilian objects.[42]

Under Protocol IV to CCW, "[i]t is prohibited to employ laser-weapons specifically designed, as their sole combat function or as one of their combat

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[36] Amended Protocol II, Article 3(6).

[37] Amended Protocol II, Article 4 and Technical Annex, para 2(a).

[38] The requirements are that they must be so designed and constructed that no more than 10 % of activated mines will fail to self-destruct within 30 days after emplacement, and each mine must have an additional or back-up self-deactivation feature so designed and constructed that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement; Amended Protocol II, Technical Annex, paras 3(a) and (b).

[39] Amended Protocol II, Article 6(3).

[40] Amended Protocol II, Article 7(1).

[41] Amended Protocol II, Article 7(2).

[42] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, 10 October 1980, Articles 2(2) and (3), respectively. Note the lengthy and restrictive definition of incendiary weapons in Article 1(1) of the Protocol. As expert commentators have observed, the definition excludes most white phosphorus and thermobaric rounds. Note also the US reservation entered on ratification of the Protocol in 2009 that would permit the attack of targets, such as a chemical weapons plant, which may be located in populated areas on the basis that the use of incendiaries to destroy the plant would produce fewer casualties than if the chemicals were released with explosive munitions; Corn et al. 2012, p. 209.

functions, to cause permanent blindness to unenhanced vision, that is, to the naked eye or to the eye with corrective eyesight devices".[43]

The Chemical Weapons Convention 1993[44] is an arms control treaty in that it prohibits not just use but also other action in relation to the weapons covered by the treaty. States party are bound never under any circumstances to use, develop, produce, otherwise acquire, stockpile or retain chemical weapons or transfer, directly or indirectly, chemical weapons to anyone. The prohibition extends to military preparations or operations associated with using such weapons and assisting, encouraging or inducing anyone to do anything prohibited to a state party to the Convention.[45] Chemical weapons for these purposes consist of any of the following, either together or separately, i.e. toxic chemicals and their precursors, but not where they are intended for purposes that do not breach the Convention and provided the types and quantities are consistent with such purposes; munitions and devices that are designed to cause death or other harm through the toxic properties of those toxic chemicals that would be released due to the use of such munitions and devices; equipment designed for use directly in connection with the employment of such munitions and devices.[46]

Toxic chemicals are chemicals which, through their chemical action on life processes, can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.[47] A 'precursor' is any chemical reactant which takes part, at any stage, in the production, by whatever method, of a toxic chemical, including any key component of a binary or multi-component chemical system.[48]

The possession of such chemicals is lawful, however, if the chemical is intended for purposes which are not prohibited under the Convention and if the amount held is consistent with those purposes. Identifying the purposes for which toxic chemicals are held is thus important in determining their lawfulness. Permitted uses are industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

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[43] Protocol on Blinding Laser Weapons, Geneva, 13 October 1995 (Protocol IV), Article 1. Incidental or collateral blinding resulting from the legitimate use of laser systems is not prohibited; Article 3. Permanent blindness means irreversible and uncorrectable loss of vision that is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes; Protocol IV, Article 4.

[44] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993 (Chemical Weapons Convention).

[45] Chemical Weapons Convention, Article I(1).

[46] Chemical Weapons Convention, Article II(1).

[47] Chemical Weapons Convention, Article II(2).

[48] Chemical Weapons Convention, Article II(3).

military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; and law enforcement, including domestic riot control purposes.[49]

Lists of prohibited chemicals appear as Schedules in annexes to the Treaty. At the time of writing there are 189 states party to the Convention.[50] Although this does not represent universal ratification, the extent of ratification and the widespread condemnation of the rare incidents in recent years when chemical weapons have been used[51] establishes that the prohibition on the use and probably the prohibition of the possession of chemical weapons other than for the purposes listed in Article II(9) are now rules of customary law.[52] It should be noted that the Convention applies to both international and non-international armed conflicts. All planning and training for use of such weapons is therefore also likely to be illegal.

Riot control agents may not be used as a method of warfare but may be used for law enforcement, including domestic riot-control, purposes. Riot control agents comprise "chemicals not listed in a Schedule to the Treaty which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure".[53]

Under Article I of the Biological Weapons Convention 1972[54] States party undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain microbial or other biological agents or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, and weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in

[49] Chemical Weapons Convention, Article II(9). Law enforcement would appear to refer to the enforcement of the domestic law and order; Fidler 2005, pp. 540–544.

[50] www.icrc.org viewed on 22 September 2013.

[51] There was international criticism of Iraq's use of sarin in March 1988 in the Kurdish village of Halabja when it is reported that approximately 5,000 people were killed and some 65,000 were injured. International concern on such matters has been renewed by reports suggesting that the Assad regime in Syria may have used similar substances in 2013; see Sarin: the deadly nerve agent 'used in Syria' that was first developed by Nazi scientists, The Telegraph 2013a, 26 April, available at www.telegraph.co.uk/news/worldnews/middleeast/syria/10021137/Sarin-the-deadly-nerve-agent-used-in-Syria-that-was-first-developed-by-Nazi-scientists.html and US Believes Syrian Government used Chemical Weapons, The Telegraph 2013b, 25 April 2013, available at www.telegraph.co.uk/news/worldnews/middleeast/syria/10019341/US-believes-Syrian-government-used-chemical-weapons.html and as to an attack apparently by Syrian armed forces that seems to have employed chemical weapons, and the associated international condemnation, see Syria chemical weapons attack killed 1,429 says John Kerry, BBC News 2013, 30 August, available at www.bbc.co.uk/news/world-middle-east-23906913.

[52] See Henckaerts J-M and Doswald-Beck L 2005 (ICRC Customary Law Study), Rules 74–76.

[53] Chemical Weapons Convention, 1993, Article II(7).

[54] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, was opened for signature on 10 April 1972 (Biological Weapons Convention).

armed conflict.[55] The Convention applies to both international and non-international armed conflicts. The extensive ratification of the Convention[56] and the consistent practice of states including those not party to the Convention makes it clear that the prohibition on using such weapons and probably the prohibitions on possessing, stockpiling, transfer and development of them are now customary law that binds all states irrespective whether they are party to the Convention.[57] All planning and training for use of such weapons is therefore also likely to be illegal.

States party to the Ottawa Convention 1997[58] undertake never under any circumstances to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines. They must also never assist, encourage or induce anyone to engage in any activity prohibited to a State party under the Convention.[59] An anti-personnel mine is a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person and that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.[60] This Convention is therefore also an arms control treaty which applies to international and non-international armed conflicts; while a large number of states are now party to it,[61] militarily significant states such as the United States, China, India, Pakistan and the Russian Federation are not, and state practice is not yet sufficiently uniform for a customary prohibition of the use of all such munitions to have formed.

The Convention on Cluster Munitions 2008 is also an arms control treaty and obliges states party never under any circumstances to use cluster munitions, to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions or to assist, encourage or induce anyone to engage in any activity prohibited to a State party under the Convention.[62] The Convention defines cluster munitions as conventional munitions designed to

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[55] Biological Weapons Convention, Article I. The Convention does not, in terms, prohibit use of biological or bacteriological weapons or materials, but during the Fourth Review Conference in 1996 it was agreed among the states party that Article 1 has the effect of prohibiting the use of such weapons; UK Manual, p. 104, note 8.

[56] There are at the time of writing 169 states party to the Biological Weapons Convention, source www.icrc.org viewed on 22 September 2013.

[57] ICRC Customary Humanitarian Law Study, Volume 1, Rule 73, p. 256.

[58] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, adopted on 18 September 1997.

[59] Ottawa Convention, Article 1.

[60] Ottawa Convention, Article 2(1).

[61] There are at the time of writing 161 states party to the Ottawa Convention, source www.icrc.org viewed on 22 September 2013.

[62] Cluster Munitions Convention, Article 1(1). Note, however, the special provisions in Article 21 that address interoperability between, respectively, states that are and are not party to the Convention.

disperse or release explosive sub-munitions each weighing less than 20 kg and the term includes those explosive sub-munitions. The definition excludes munitions or sub-munitions designed to dispense flares, smoke, pyrotechnics or chaff, to be used exclusively for an air defence role or to produce electrical or electronic effects. Also excluded from the definition are munitions that avoid indiscriminate area effects and the risks posed by unexploded sub-munitions by containing fewer than 10 explosive sub-munitions each weighing over 4 kg and each of which is designed to detect and engage a single target object. Each explosive sub-munition must be equipped with an electronic self-destruction mechanism and with an electronic self-deactivating feature.[63]

Explosive sub-munitions are conventional munitions which, in order to perform their task, are dispersed or released by a cluster munition and are designed to function by detonating an explosive charge prior to, on or after impact.[64]

These, then, in brief outline form are the core provisions that determine which weapons are unlawful and may thus not be used in armed conflict. We should now consider what obligations states have to determine the lawfulness of weapons they plan to acquire.

5.3 Weapon Reviews: The Treaty Rule

States that are party to API[65] are required "[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare […] to determine whether its employment would, in some or all circumstances, be prohibited by th[e] Protocol or by any other rule of international law applicable to the High Contracting Party".[66]

The obligation imposed by this provision should be unpacked and each element should be considered as it arises. That is what we will now do. The obligation to review the lawfulness of a weapon, means or method first arises with its study. Importantly, it is a weapon, means or method that must be being studied for the weapons review duty to exist, not, for example, a technology which might at some point in the future be capable of development into a weapon, means or method. It will be a matter for national judgment when something that will have started,

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[63] Cluster Munitions Convention, Article 2(2). The treaty defined 'self-destruction mechanism' as meaning an incorporated automatically functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated. Similarly, 'self-deactivating' means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery that is essential to the operation of the munition.

[64] Cluster Munitions Convention, Article 2(3).

[65] At the time of writing there were 173 states party to API, source www.icrc.org viewed on 22 September 2013.

[66] API, Article 36; for a discussion of weapon reviews, see Corn et al. 2012, pp. 203–207.

perhaps, as the study of a technology becomes the study of a weapon. It is suggested that this happens when particular kinds of weaponisation are first being considered or evaluated.[67]

The notion of 'development' seems to involve the application of materials, equipment and other elements to form a weapon and includes the improvement, refinement and probably the testing of the prototype weapons with a view to achieving optimal performance.[68] 'Acquisition' and 'adoption' involve obtaining weapons from commercial undertakings and/or from other states, whether on commercial terms, as a gift, or under any other form of transaction. 'Adoption', in relation to methods of warfare, involves a state or its armed forces deciding to use a particular weapon or method of warfare in military operations. Weapons that are acquired from commercial undertakings or from other states must be reviewed for legal compliance before they are acquired, irrespective of whether the other state has previously conducted its own weapons review.

The terms 'weapon', 'means of warfare' and 'method of warfare' are not defined in the law of armed conflict, and yet those are the terms that describe what must be reviewed under Article 36. 'Weapons' are offensive capabilities that can be applied to a military object or enemy combatant.[69] Of importance are notions of the use,[70] intended use[71] and design purpose[72] of the relevant object and these should therefore perhaps be reflected in the definition of 'weapon'. This would imply that, for the present purposes, a weapon is an offensive capability that is applied, or that is intended or designed to be applied, to a military object or enemy combatant. A destructive, damaging or injurious effect of the weapon need not result from physical impact as the offensive capability need not be kinetic.[73] So, for example, a cyber tool may be capable of causing damaging or injurious effects to military objects or to combatants and thus may be capable of constituting a weapon. It will only actually be a weapon, however, if the cyber tool, or a system of which it is an integral part, is used, intended or designed to deliver an offensive capability against an adversary in the course of an armed conflict.

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[67] Boothby 2009, p. 345.

[68] Consider Daoust et al. 2002, p. 348.

[69] Boothby 2009, p. 4 citing McClelland 2003, p. 397. Weapons are described in the Air and Missile Warfare Manual as "a means of warfare used in combat operations, including a gun, missile, bomb or other munitions, that is capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of, objects". AMW Manual, Rule 1(ff).

[70] As an example of 'use', a combatant who takes up a rock and uses it to injure his opponent converts what was not a weapon before he took it up into a weapon by virtue of his use of it.

[71] An example of 'intended use' would be collecting a number of rocks intending to use them for hostile purposes; the collection of the rocks and the intended purpose for doing so converts them into weapons by virtue of that intent and in advance of their actual use.

[72] So designing an object as to be used to cause injury or damage in the course of an armed conflict will render that object a weapon, for example when a flint is shaped into an arrow-head.

[73] Consider for example Commentary to AMW Manual Rule 1(ff), at para 1.

Means of warfare are weapons, weapon systems[74] or platforms employed for the purposes of attack[75] whereas methods of warfare are activities designed adversely to affect the enemy's military operations or military capacity[76]; accordingly, means of warfare can be regarded as the equipment used to cause harm to the enemy and methods of warfare are the ways in which the hostilities are conducted.

When undertaking a review under Article 36, a state assesses the general circumstances in which it is intended to use the weapon and determines whether the existing rules of law applicable to that state prohibit or restrict those general intended circumstances of use. If they do, this will be made clear in the weapon review.

5.4 Weapon Reviews: The Customary Rule

It seems highly likely that there is a customary rule requiring all states to review new weapons to determine whether they comply with the law that applies to the relevant State. Some may find the customary status of this proposition questionable. The first indication of such a requirement is to be found in the statement in the 1868 St. Petersburg Declaration that the states party "reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity".[77] As Hays Parks has noted, Article 1 of Hague Convention II of 1899 and Article 1 of Hague Convention IV of 1907 require states party to issue instructions to their armed land forces "in conformity with the Regulations" annexed to those instruments. Those Regulations include Article 23(e) which prohibits the employment of weapons of a nature to cause superfluous injury or unnecessary suffering. Hays Parks, applying the maxim *pacta sunt servanda,* concludes that states have a general duty to engage in good faith performance of their treaty obligations and that "[t]his would have included a duty to ensure military weapons and munitions complied with the

[74] Dinstein 2010, p. 1.

[75] AMW Manual, Rule 1(t). As to the significance of weapons reviews, see generally Dinstein 2010, pp. 86–88. Dinstein considers that there is a tangible need for an objective and impartial inspection of weapon development programmes by an international monitoring body, but observes that there is at present no such modality and that much weapons development is currently undertaken in secret. The author considers such secrecy as inevitable and as frequently necessary from a state security perspective, and sees little foreseeable prospect of widespread transparency between states on these matters.

[76] AMW Manual, Rule 1(v).

[77] St. Petersburg Declaration, 1868, final para.

Hague Convention IV and obligations contained in other treaties".[78] The ICRC comes to the conclusion that "[t]he requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to *all* States, regardless of whether or not they are party to Additional Protocol 1".[79] The HPCR Manual on International Law Applicable to Air and Missile Warfare. The AMW Manual 2009 suggests that "[s]tates are obligated to assess the legality of weapons before fielding them in order to determine whether their employment would, in some or all circumstances, be prohibited"[80] and the Tallinn Manual on the International Law Applicable to Cyber Warfare 2013 (Tallinn Manual) contains a similar Rule that "[a]ll States are required to ensure that the cyber means of warfare that they acquire or use comply with the rules of the law of armed conflict that bind the State".[81]

Although, so far as is known, relatively few states have systematic administrative arrangements to ensure that all weapons are subjected to review in accordance with these Rules[82] and although the ICRC made no reference to such a rule in its Customary Law study, it is nevertheless decidedly arguable that the obligation to conduct such a review is customary and thus binds all States.

Neither customary nor treaty law is prescriptive as to the form that a weapon review must take, nor as to the procedure to be adopted in preparing it. Advice to an appropriate commander may be sufficient.[83] The Tallinn Experts were divided over whether the customary Rule extends to methods of warfare.[84]

5.5 Legal Criteria for Assessing Weapons, Means and Methods of Warfare

Article 36 makes it explicitly clear that the weapon review must be by reference to the rules of the law of armed conflict that bind the State. In Sect. 5.2, we summarized the important rules of the law of armed conflict that apply to weapons.

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[78] Hays Parks 2005, pp. 55–57.

[79] Lawand 2006, p. 4.

[80] AMW Manual, Rule 9, citing Article 1 of Hague Convention II of 1899 and Article 1 of Hague Convention IV of 1907, which are accepted as having customary law status.

[81] Tallinn Manual, Rule 48(a). The Commentary to this Rule also cites Article 1 common to the Geneva Conventions of 1949. References in military manuals include the UK Manual, paras 6.20–6.20.1, the United States Naval Commanders' Handbook on the Conduct of Naval Operations, NWP 1-14, para 5.3.4, the Canadian Manual para 530 and the German Manual para 405.

[82] Lawand 2006, p. 5.

[83] Tallinn Manual, commentary accompanying Rule 48, para 3.

[84] Tallinn Manual, commentary accompanying Rule 48, para 4.

In this section, and by reference to those Rules, we list the criteria against which a state should undertake such a review. Each criterion refers to weapons, means and methods of warfare reflecting the obligation of states party to API. States that are not party to API will apply similar criteria when reviewing weapons.

The first two criteria reflect the two fundamental customary principles of the law of weaponry:

(1) Whether the weapon, means or method of warfare is of a nature to cause superfluous injury or unnecessary suffering. This reflects the customary superfluous injury/unnecessary suffering principle discussed in Sect. 5.2.1. The original US Department of Defense Directive for weapons reviews included the following explanation of the assessment to be made when applying the superfluous injury and unnecessary suffering test, an explanation that is both authoritative and practical.

> The prohibition of unnecessary suffering constitutes acknowledgment that necessary suffering to combatants is lawful and may include severe injury or loss of life. There is no agreed international definition for unnecessary suffering. A weapon or munition would be deemed to cause unnecessary suffering only if it inevitably or in its normal use has a particular effect and the injury caused is considered by governments as disproportionate to the military necessity for it, that is, the military advantage to be gained from its use. This balancing test cannot be conducted in isolation. A weapon's or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield. A weapon is not unlawful merely because it may cause severe suffering or injury. The appropriate determination is whether a weapon's or munition's employment for its normal or expected use would be prohibited under some or all circumstances. The correct criterion is whether the employment of a weapon for its normal or expected use inevitably would cause injury or suffering manifestly disproportionate to its military effectiveness.[85]

The notion of 'comparable' weapons may require a degree of lateral thinking when considering new technologies. A cyber tool, for example, might be developed to achieve a similar kind of military purpose to that which would normally be achieved, say, using kinetic means such as a conventional bomb. The proper comparator would seem in such a case to be the means that would, absent the new technology, otherwise be employed. Comparing the fundamentally different damaging and injuring mechanisms of the two weapons systems is of course going to involve comparing unlike phenomena. This, nevertheless, is the process that the law requires. It should be recalled, however, that it is the injury and suffering that the alternative weapons involve that constitute the comparator.

(2) Whether the weapon, means or method of warfare is by its nature indiscriminate. This reflects the customary rule in Article 51(4) of API discussed in Sect. 5.2.2. It must be stressed that the issue here is whether the weapon,

[85] Reproduced in Hays Parks 2006, at footnote 25. For a discussion of this test, see Corn et al. 2012, pp. 204–205.

means or method will inevitably act in an indiscriminate way either because it cannot be directed or because its damaging effects cannot be limited, as required, to the military objective.[86]

The two environmental protection criteria that follow reflect the non-customary rules discussed in Sect. 5.2.3 and apply to States party to the treaties on which they are based. The first criterion is based on Articles 35(3) and 55 of API and the second on the Environmental Modification Convention. The criteria are therefore:

(3) For States party to API, whether the weapon, means or method of warfare is intended, or may be expected, to cause widespread, long-term and severe damage[87] to the natural environment. States may of course, as a matter of voluntary national policy as opposed to law, choose to impose on themselves more stringent limits than this API criterion would imply.[88]
(4) For States party to the Environmental Modification Convention 1976, whether the weapon, means or method of warfare constitutes military or any other hostile use of environmental modification techniques that may be expected to have widespread, long-lasting or severe effects[89] as the means of destruction, damage or injury to any other state that is party to the treaty.
(5) A weapon review should then apply the rules relating to specific weapons and weapons technologies that were summarized in Sect. 5.2.4 and that are relevant to the weapon, means or method of warfare that is being reviewed. It should be noted that the focus in Sect. 5.2.4 was on prohibited weapons. Certain weapons, for example, anti-vehicle mines, booby-traps, other devices within Protocol II and Amended Protocol II to CCW and incendiary weapons as that term is defined in Protocol III to CCW, are subject to legal restrictions as to the circumstances in which the particular weapon may lawfully be used. If the planned procurement of the weapon contemplates its use in circumstances that would or may conflict with such restrictions, the weapon reviewer will need to draw attention to the relevant legal restrictions in his review.

[86] In this regard consider as an example the kind of indiscriminate attack referred to in Article 51(5)(a) of API. Note the view that certain Scud rockets used by Saddam Hussein to attack Israeli and Saudi Arabian cities during the first Gulf War violated this rule and were indiscriminate; Corn et al. 2012, p. 206.

[87] For the meaning of these terms see Sect. 5.2.3.

[88] Moreover, it is conceivable that environmental considerations will over time impinge more on military activities; see for example UK Ministry of Defence, DCDC, Future Maritime Operational Concept 2007, 13 November 2007, para 122.

[89] For the meaning of these terms see Sect. 5.2.3.

5.6 Applying Weapons Law Rules to Four Novel Technologies

The interesting question that this section seeks to address is how the weapons law rules and resulting criteria that we have so far considered apply to novel and forthcoming weapons technologies. Rather than analyse the matter in the abstract, we shall try to apply the rules and criteria to four representative developing technologies and shall seek to determine whether these new technologies challenge the relevance and applicability of the criteria that we have discussed. It should be emphasized, however, that these are mere examples of the likely emerging weapons technologies.

5.6.1 Autonomous Weapons

Chapter 4 explained what we mean by autonomous weapons and outlined the law that applies to attacks undertaken using such technologies. In this subsection, we look at the factors that must be taken into account when conducting a weapons review of an autonomous attack weapon system. We will do so by applying in turn the criteria referred to in Sect. 5.5.

The superfluous injury and unnecessary suffering rule is of greatest relevance to the damaging, wounding or injuring effect of the weapon itself as opposed to the technology that is used to identify the target for the weapon. Therefore, when specifically evaluating the autonomous weapon's guidance system, as opposed to the weapon it guides, the superfluous injury and unnecessary suffering criterion is likely to be irrelevant and will not therefore be discussed further.[90]

Care will be needed in applying the indiscriminate weapons rule. The actual performance of the autonomous target recognition technology, as demonstrated in tests and/or in battlefield use will be of great importance. Clearly, the design intent will be that the system reliably recognizes objects, or in the indeterminate future persons, that are lawful objects of attack because, in the case of objects, they are for example items of military hardware such as tanks, artillery pieces, armoured personnel carriers, etc. While the design purpose of the technology may therefore be to discriminate in that manner, data as to its performance will make it clear whether the technology enables compliance with the discrimination rule or not. As noted earlier in this chapter, however, a weapon will only be indiscriminate by nature if it cannot be directed at a specific military objective or if its effects cannot be limited as required by international law and if the result in either case is that the

[90] See Anderson and Waxman 2013, pp. 10–11, available at www.hoover.org/taskforces/national-security. See Schmitt and Thurnher 2013, pp. 244–245 as to the application of the superfluous injury principle to autonomous weapon systems.

nature of the weapon is to strike military objectives and civilians or civilian objects without distinction.

Let us consider three examples. Imagine an autonomous attack system that is designed to recognize the unusual shape of an artillery piece, tank or other item of military equipment and that performs that recognition task satisfactorily in tests that realistically replicate the generic intended circumstances of use; the indiscriminate weapons rule is not likely to be a difficulty here.

Consider alternatively an autonomous attack system that has been so designed that it will recognize as a target, and authorize an attack of, any vehicle above a particular gross weight, or with a metal content above a specified minimum, that appears in its area of search. Imagine furthermore that numerous kinds of civilian heavy goods and public service passenger vehicles that are in widespread use around the world would satisfy the preset algorithms and thus be recognized by the system as targets it has been permitted to attack. Such a weapon may be capable of discriminating use in particular circumstances, for example, if its attack options are suitably constrained at the mission planning stage, so it cannot be said to be indiscriminate by nature. However, the legal review must draw attention to the restricted circumstances in which its employment would be legitimate[91] and should set out the actions that will be required in order to seek to ensure that when the weapon system is used the discrimination principle will be complied with.

The treaty and customary rules of the law of armed conflict include no provision that refers explicitly to autonomous attack technology.[92]

In Chap. 4 we considered the implications for autonomous attack technologies of the precautionary obligations in Article 57 of API. Compliance with Article 57 is an element of targeting law which would not normally fall to be considered in a weapons review. Indeed, as we saw earlier in this chapter, it is not specifically referred to either in the summary of weapons law or in the criteria for legal review.

However, if a weapon system employs autonomous attack technology in such a way that compliance with specific legal rules is rendered impracticable, for example, if legally mandated precautions in attack cannot be undertaken by the autonomous system, the legal review should refer to this and should explain the limiting effect this is likely to have on the circumstances in which the weapon system can lawfully be used. The precautions required by Article 57 were summarized in Chap. 4 and do not require repetition here. It suffices for the purposes of this subsection to note that while the autonomous target recognition technology may satisfy the obligation to do everything feasible to verify the status of the

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[91] In this regard, recall the reference to use in some or all circumstances in Article 36 of API and in the suggested customary rule. As to the application of the indiscriminate weapons rule to autonomous attack technology, see Schmitt and Thurnher 2013, pp. 245–250 and as to the weapons review of such systems, see pp. 271–276.

[92] S.S. 'Lotus' (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10, (Sept. 7), p. 18 established the principle that restrictions upon the independence of States cannot be presumed. Applying this principle, the absence of specific reference to such technologies leads to the conclusion that they are not the subject of a prohibition.

object of attack as a military objective, it is compliance with the evaluative precautions discussed in Sect. 4.4 that will, for the reasons set out in that subsection, likely pose challenges for the autonomous technology. If, however, methods of using the weapon system can be devised, or restrictions as to the circumstances of use can be imposed, that will enable the weapon system to be used in a manner that complies[93] with the principle of distinction, then the failure of the machine to be able to undertake evaluative decision making will not preclude its fielding if, for example, the method of intended use is such that human operators will be able to take the required precautions.[94] The important point for the purposes of this chapter is that these are matters which will have to be fully considered when preparing a legal review of such a weapon system and which will need to be discussed thoroughly in the review document.

5.6.2 Cyber Weapons

In Chap. 4 we discussed certain cyber events that have taken place in recent years, and it is evident from these events that there is a potential, indeed a likelihood, for cyber capabilities to become a new and vitally important means of warfare. So it is logical that we should consider the notion of cyber weapons and, by extension, that we should consider how the weapons law rules and criteria we have been discussing should be applied to these new capabilities. Some, however, will have a fundamental objection to the whole idea of 'cyber weapons'. To those who believe that the idea of a weapon necessarily presupposes the immediate and direct application of kinetic force, the notion that a cyber capability can be a weapon will seem at first glance unacceptable.

So at this point let us revisit the definition of weapon we formulated earlier in this chapter, namely "a weapon is an offensive capability that is applied, or that is intended or designed to be applied, to a military object or enemy combatant. A destructive, damaging or injurious effect of the weapon need not result from physical impact as the offensive capability need not be kinetic."

The two essential ingredients are that the equipment is an offensive capability and that it is applied, intended or designed to be applied to a military object or enemy combatant. There is no requirement that any particular effect of the weapon be caused by the direct application of kinetic force; the use of biological agents or toxins, of chemical agents, of asphyxiating gases and so on in war, none of which

[93] Performance of the system cannot be determined in advance with certainty. The requirement is simply that these matters be addressed and that such restrictions be developed as are necessary to ensure that the circumstances in which the autonomous system is used are such that its use will likely comply with the discrimination rule.

[94] It will, however, be important to ensure that the limitations on the circumstances of use, disclosed in the weapons review, are accurately reflected in the concept of use for the weapon, in training and in any protocols that determine its subsequent employment.

presupposes a direct application of kinetic force, has nevertheless long been recognized as the use of a weapon. Mike Schmitt concluded that it is the violent consequences of a cyber operation that are critical to its characterization as a 'cyber attack'.[95] If one accepts that analysis, it follows logically that if a cyber capability is used, designed or intended to cause violent consequences for combatants or military objects during an armed conflict, that cyber capability is a cyber weapon.[96]

Weapon reviews are normally conducted by an individual, team or committee appointed specifically for the purpose. The reviewer will consider the information as to the weapon, its characteristics, construction, its performance in tests or during operational use, the intended circumstances of its use, its wounding effects, the military purpose associated with its designed use and so on. The determination as to the legality or otherwise of the generic proposed uses of the weapon is normally made before the weapon is fielded, with the result that commanders know in advance of their employment that the weapons issued to them have already been judged compliant with their state's legal obligations.

Contrast the position with a cyber weapon that is developed with a specific cyber attack on a known objective in mind. The cyber weapon will be so designed as to be able to reach and attack the appropriate network or node, for example, and to have the desired effect on that targeted facility. It therefore follows that weapons law advice as to the legitimacy of the proposed cyber weapon will need to be given to the operational commander by his legal adviser at the same time as the latter gives targeting law advice as to the lawfulness of the proposed attack. This implies that the legal advisers to operational commanders who are likely to be using such cyber attack capabilities must be sufficiently conversant with the relevant weapons

[95] Schmitt 2011, pp. 93–94. Yoram Dinstein considers 'computer network attacks' qualify as attacks only if they engender violence through their effects. Breaking through a firewall or planting a virus is not, alone, sufficient to constitute an attack. Citing Knut Dörmann, he argues that a computer network attack does, however, constitute an attack if it causes casualties, e.g. by shutting down a life-sustaining software programme, or brings about serious damage to property, as a minimum by completely disabling the target computer; Dinstein 2010, p. 2. Tony Rogers notes that it remains to be seen what view a competent tribunal will take. He foresees the application by such a tribunal of the principle of proportionality, of the obligation to take constant care to spare the civilian population and considers, and he must be right, that commanders and military planners should take the same precautions in relation to computer network attacks as they take in relation to attacks involving the use of weapons in general and should take the same approach in deciding what is a military objective; Rogers 2012, p. 34 all of which implies the view that certain cyber capabilities can be weapons. Other acknowledged experts share the view that "time and practice will ultimately define the regulatory framework applicable to this capability"; Corn et al. 2012, p. 221.

[96] Note the description of 'cyber weapons' in the Tallinn Manual as "cyber means of warfare that are by design, use, or intended use capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of objects, that is, causing the consequences required for qualification of a cyber operation as an attack"; Tallinn Manual, commentary accompanying Rule 41, para 2.

law rules to be able to discuss the weapons law issues in their advice to the commander.[97]

We discussed the concept of a 'cyber weapon' earlier. The phenomena to be reviewed will consist of the malware as well as the software and hardware that, taken together, constitute the cyber weapon system, i.e. that are to be used, are intended or are designed to cause the damaging or injuring effect on the enemy. While the hardware equipment will be referred to in the review, it will not usually be of greatest importance when considering the lawfulness of the cyber weapon; the lawfulness of the weapon will usually be determined by the characteristics and effect(s) of the cyber tool, e.g. the malicious logic.[98]

Not only will the weapons law and targeting law advice often have to be given at the same time to operational commanders; the nature of the weapons law advice will also tend to be different when it is a cyber weapon that is being considered. A weapon review of a non-cyber weapon will generally consider the criteria discussed in this chapter in generic terms. Thus, for example, it is generic military utility to be derived from the use of the weapon in its normal, designed manner and circumstances that is assessed. The targeting law decision is by contrast usually concerned, for example, with the military utility to be obtained from the use of the non-cyber weapon on a particular occasion against a particular target in a particular operational and situational context.

The fact that cyber weapons will often be designed with a particular attack on a specific military objective in mind affects both the arrangements for giving legal advice and the content of that advice. Generically based weapons law advice will probably be insufficient. Rather, the weapons law evaluation of a cyber tool designed for a particular attack on a specified target must take account of the circumstances peculiar to the planned attack in determining whether the weapons law criteria, outlined earlier in the chapter, are met.

A cyber weapon is likely to have numerous orders or levels of effect and these must all be considered when weapons law advice is being prepared on such a weapon. The first level will be the effect the cyber weapon has on the data in the target node, network or computer or its effect on the ability of the affected router to move legitimate data. The impact that such data alteration has on the performance of the targeted computer system is the second level of effect. That altered performance is liable to affect the facility that the targeted computer serves; this is the

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[97] The legal advisers referred to here are those deployed to operational commanders at appropriate levels of command in accordance with Article 82 of API. For the UK doctrine on the provision of legal support to deployed operations, see Legal Support to Joint Operations, Ministry of Defence Development, Concepts and Doctrine Centre, JDP 3-46 dated August 2010.

[98] Malicious logic is, so far as relevant, defined in the Glossary to the Tallinn Manual as "[i]nstructions and data that may be stored in software, firmware, or hardware that is designed or intended adversely to affect the performance of a computer system. The term 'logic' refers to any set of instructions, be they in hardware, firmware, or software, executed by a computing device. Examples of malicious logic include Trojan horses, rootkits, computer viruses, and computer worms."

third level of effect. The injury, damage or destruction suffered by the persons or objects that are the customers of that affected facility constitute the fourth level of effect. All such levels of effect that are attributable to the use of the cyber weapon must be considered when reviewing the cyber weapon.[99] So, if at any of those levels of effect, the cyber weapon will inevitably cause pain, wounds, other injuries or suffering that are superfluous or unnecessary in the sense discussed in this chapter, the superfluous injury and unnecessary suffering test will have been broken.

A cyber weapon the effects of which can be limited to a computer node, network or system that is a military objective will not breach the indiscriminate weapons rule. Taking the Stuxnet attack against Iran[100] as an example, it is important to note that, while systems that were not the apparent object of the cyber attack were allegedly infected by the malware, the damaging effect was reportedly limited to the systems that were its object.[101] Accordingly, the cyber attack, and thus the weapon used to undertake it, seems to have complied with the discrimination rule because mere infection of other systems that does not involve damaging them is insufficient to amount to a breach of the rule.[102] Noting that the Stuxnet virus was not reportedly intended to infect computers outside the targeted systems of the nuclear installations and yet somehow replicated itself outside Iran, Cordula Droege makes the good point that "[w]hile the spread of the virus far beyond the intentions of its creators might not have caused any damage, it shows how difficult it is to control that spread".[103] This is clearly therefore a factor that a weapons reviewer of a similar cyber capability will have to bear in mind.

Rather different considerations would apply, for example, to a cyber weapon that is designed to deposit malware, i.e. malicious logic, onto a targeted website that serves both military and civilian users. If, say, all computers used to connect to that website become infected by the malware and suffer damage, meaning loss of functionality requiring replacement of physical components,[104] such a cyber weapon is likely to breach the rule. Similarly, if at any of the previously discussed levels of effect, the nature of the cyber weapon is to cause indiscriminate damage, it would also breach the rule.

The fact that computers are used to undertake an attack is per se unlikely necessarily to involve environmental impact. However, the use of cyber methods

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[99] The effects to be considered will not necessarily be limited to those reflected in the suggested levels of effect. If, for example, a cyber weapon will inevitably interrupt the normal service from computers other than the targeted computer, for example computers in a botnet, and if it will thus cause injury or damage, that factor will need to be considered in determining e.g. whether the cyber weapon is indiscriminate by nature.

[100] Fildes 2010 at www.bbc.co.uk/news/technology-11388018 and Broad et al. 2011, available at www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?pagewanted=all.

[101] Richmond 2012, pp. 860–861.

[102] Tallinn Manual, Commentary accompanying Rule 43, para 5.

[103] Droege 2012, p. 571.

[104] Tallinn Manual, Commentary accompanying Rule 30, paras 6 and 10.

to target, for example, a nuclear electricity generating station with a view to causing the release of nuclear contaminants as a result of an explosion of its core would be likely to result in environmental damage that would be likely to breach the rule. Thus, it is the nature of the target and of the attack on it that are likely to have environmental consequences rather than the fact that cyber methods were employed.

There are no explicit rules of the law of armed conflict that specifically permit, prohibit or restrict the lawful circumstances of use of cyber weapons. Some of the weapon-specific rules summarized earlier in this chapter may, however, need to be considered when particular kinds of cyber weapon are subjected to review. Consider a cyber weapon which is designed to insert a kill switch into the computer system controlling distribution of electrical power. Imagine that activation of the kill switch, which is designed to occur when the targeted computer is switched on, stops electricity distribution and causes power blackouts. The cyber attacker is aware that there are no back-up generators and certain consumers are expected to suffer injury or death as a result of the power cuts. It could be argued that such a device is a cyber booby trap[105] with the consequence that use of such a cyber weapon by a state that is party to these treaties must comply with Articles 3, 4, 6, 7 and 8 of Protocol II and Articles 3, 7, 9 and 12 of Amended Protocol II.[106]

Parties to the same treaties should also consider the definition of 'other device' in Protocol II and in Amended Protocol II. In the following example, a thumb drive is used to insert a cyber weapon, which includes a kill switch, into a targeted computer system. The cyber attacker retains control over the kill switch, activates it and thereby causes the electricity distribution system to stop with the result that power blackouts occur causing death and/or injury. Whether such a cyber weapon constitutes an 'other device' for the purposes of Protocol II and/or Amended Protocol II will likely depend on whether insertion by use of a thumb drive is the same thing as 'manual emplacement' in the treaty definitions. Arguably it is not, because in the example what is being emplaced by hand is the thumb drive not the malware, and it would seem to be the malware that constitutes the device referred to in the treaty, but this is a fine distinction and it will be for individual states, and their weapon reviewers, to take a view.

A cyber operation might be undertaken with the purpose of taking control of a platform, such as a UCAV, with a view to using the weapon that the UCAV is carrying against the enemy. Let us consider a situation in which state A has taken control of state B's UCAV which is carrying an airfield denial weapon that includes anti-personnel landmines as part of the composite weapon. State B is not a party to the Ottawa Convention whereas state A is a party. Having obtained

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[105] Tallinn Manual, Rule 44 and accompanying Commentary.

[106] While a cyber attack on a hospital would breach other law of armed conflict rules, if the view is taken that such a cyber weapon is indeed a booby trap, this will have the effect that it would be unlawful for states party to Protocol II and/or Amended Protocol II to use such a cyber weapon if it is in any way associated with any of the items listed in Article 6(2) of Protocol II or Article 7(1) of Amended Protocol II.

control of the UCAV, if state A were to use the airfield denial weapon against one of state B's airfields, this would breach state A's obligations under the Ottawa Convention.[107]

So a cyber weapon may render ad hoc weapons law rules relevant if it is used to take control of weapons to which specific rules apply.

If it were to become possible by cyber means to take control of the enemy's weapon and then redesign the way in which it operates, this would likely have important legal implications. This is because a number of the weapons law definitions refer to the design purpose of the weapon covered by the legal provision. So, to take an example, if it were possible to take cyber control of a laser system originally designed as a range finder and then to re-design the weapon by cyber means so that it has a combat function to cause permanent blindness to unenhanced vision, this would bring the weapon within Protocol IV to CCW. It follows that a state undertaking such a cyber operation must have regard to the law by which it is bound in deciding whether the re-design will result in a weapon or method of warfare that is prohibited to that state and whether the use of the redesigned weapon will be lawful in the intended circumstances of use.

5.6.3 Nanotechnology

Nanotechnology is "the ability to measure, organize and manipulate matter at the atomic and molecular levels"[108] so the application of nanotechnology becomes the human arrangement of atoms and molecules to produce substances of choice, or at least with the intention of producing substances of choice, or the use of nanomachines to so arrange atoms and molecules in particular ways.[109] Considerable national and corporate expenditure in various parts of the world is being devoted to research and development in the nanotechnology sphere, and while some of the resulting applications are known and are essentially peaceful in nature,[110] other proposed implementation of the technology is characterized by secrecy, particularly where the activity is directed towards potential military uses.[111] Some characteristics of some of the emerging materials seem to raise fundamental concerns owing to their potential to cause harm. This potential seems to apply

[107] As an alternative example, consider a similar operation that takes control of a UCAV, this time carrying an incendiary weapon within the Protocol III definition. If the state taking control is party to Protocol III, any use of the incendiary weapon against its enemy must comply with that treaty, particularly Article 2(2).

[108] Miller 2003, p. 5.

[109] Whether the resulting substance exhibits all of the chosen characteristics without also exhibiting other undesirable tendencies may not be immediately apparent.

[110] See for example the already developed peaceful applications discussed in Pinson 2004, p. 285.

[111] Nasu and Faunce 2009/2010, pp. 25–26.

irrespective of whether the intended application is civilian or military in nature,[112] and it remains to be seen whether concern is sufficient to lead to international legal controls over the research, development and/or production of such materials. That is a question that lies outside the intended scope of this volume.

In the context of the current chapter, it is unlikely that nanotechnology as such will require legal review by states. The greater probability is that a weapon, means or method of warfare that in part is constructed using materials derived from the application of nanotechnology will need to be reviewed. The criteria associated with such reviews and discussed earlier in this chapter must therefore be applied.

Nanotechnology is based on the notion of a nanometer, one billionth of a meter. Substances are ground down to very small sub-particles[113] and are then built up again, thus changing the characteristics of the substance in potentially useful ways. Substances may, for example, be reduced in weight and increased in durability and strength, thus perhaps yielding protective or offensive benefits, such as more powerful and efficient bombs.[114] Hitoshi Nasu notes that engineered nanomaterials and nanoparticles possess unique characteristics such as flame retardation, dirt-resistance, increased electrical conductivity and improved hardness and strength with reduced weight.[115]

Hitoshi Nasu and Thomas Faunce discuss military advantages to be anticipated from nanotechnological developments in the weapons field as including

> lighter, stronger and more heat-resistant armour and clothing, bio/chemical sensors, lighter and more durable vehicles, miniaturization of communication devices, conventional missiles with reduced mass and enhanced speed, small metal-less weapons made of nanofibre composites, small missiles and artillery shells with enhanced accuracy guided by inertial navigation systems, and armour-piercing projectiles with increased penetration capability.[116]

It appears that nanotechnology will also prove useful in helping to detect, identify and perhaps address future bioterrorist threats.[117] The technology that produces these advantages, however, also generates significant concerns.[118]

Any legal review of a weapon with nanotechnological components will need to be supported by the same categories of data as is required in respect of any other weapon review. Information will be required specifying the wounding or injuring

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[112] See for example Blake and Imburgia 2010, pp. 180, 181. See also Nasu and Faunce 2009/2010, p. 27.

[113] The width of a human hair is approximately 80,000 nm. A human red blood cell is roughly 1,000 nm wide; Newberger 2003, p. 651.

[114] Blomfield 2007, available at www.telegraph.co.uk/news/worldnews/1562936/Russian-army-tests-the-father-of-all-bombs.html.

[115] Nasu 2012, p. 655.

[116] Nasu and Faunce 2009/2010, pp. 23–24.

[117] Nasu and Faunce 2009/2010, pp. 27–28.

[118] See Nasu and Faunce 2009/2010, pp. 22–23, 29-30; Faunce et al. 2008, p. 231; Pinson 2004, pp. 288–290.

effect of the weapon and the suffering it is expected to occasion. The focus will be on whether the fact that certain components are based on nanotechnology makes a significant difference to the wounding or injuring effect of the weapon or to the suffering its designed use is going to occasion.

The ability to direct the weapon to a specific military objective is unlikely to be critically affected by the construction of some of its components using nanotechnology, but the reviewer should satisfy himself in addition that the relevant nanotechnological substance, whether in a munition that failed to operate in the designed way or in the fragments left after its operational use, will not have uncontrollable effects of the sort referred to in Article 51(4)(c) of API. This would seem unlikely in practice to be an issue, but the weapon review should address the matter.

The environmental effect of a weapon, parts of which have been made using nanotechnology, should be considered carefully in a weapon review. This includes any effect that the weapon may have on the environment in a situation where, having been fired, it fails to explode, or otherwise fails to operate as intended and therefore remains intact on the surface of the battlespace. The review should also address the effect on the natural environment of any fragments or substances that may be expected to remain in the battlespace after the weapon has performed its designed task.[119] Scientific data will be required both as to the composition of these objects, substances or fragments and the consequences that they may be expected to have for the environment and for human health, it being recalled that such consequences only breach the API rules if they are widespread, long term and severe.[120] However, Hitoshi Nasu explains that "[w]hile no conclusive toxicity profile for engineered nanomaterials and nanoparticles is yet available, there is

[119] Consider, for example, the Dense Inert Metal Explosive (DIME). DIME involves an explosive spray of superheated micro-shrapnel made from milled and powdered Heavy Metal Tungsten Alloy (HMTA), which is highly lethal within a relatively small area. "The HMTA powder turns to dust (involving even more minute particles) on impact. It loses inertia very quickly due to air resistance, burning and destroying through a very precise angulation everything within a four-meter range—and it is claimed to be highly carcinogenic and an environmental toxin"; Nasu and Faunce 2009/2010, p. 22 citing Miller et al. 2001, p. 115. Hitoshi Nasu and Thomas Faunce suggest that DIME's "capacity to cause untreatable and unnecessary suffering (particularly because no shrapnel is large enough to be readily detected or removed by medical personnel)" is a cause for considerable concern; Nasu and Faunce 2009/2010. This is not the place to conduct a legal review of such a technology or weapon system. However, any such review should of course apply the superfluous injury and unnecessary suffering test, should take into account the environmental impact to the extent that the reviewing state is bound by relevant environmental protection rules such as Articles 35(3) and 55 of API, and should consider Protocol 1 to the Conventional Weapons Convention, again to the extent that the reviewing state is bound by that treaty. Note the assertion that Israel has used such DIME weapons in Gaza in 2006 and see the discussion of the relevance of Protocol 1 in Nasu and Faunce 2009/2010, pp. 32–33.

[120] Scientific data should also address whether the composition of the weapon, including its nanotechnological elements, renders it a prohibited poison, a chemical or a biological weapon, and therefore whether it is prohibited under customary law, the Chemical Weapons Convention or the Biological Weapons Convention.

already compelling scientific evidence of human and environmental toxicity in relation to certain [nanomaterials and nanoparticles]".[121] A state reviewing a new means or method of warfare involving the use of such materials will therefore need to consider whether the environmental impact of such substances may be expected to breach the rules to which that state is subject, whether the injurious effect of these substances will cause the weapon to be indiscriminate by nature and whether the suffering that the substances may be expected to cause to enemy combatants is superfluous.

There is no specific international law rule relating to nanotechnology as such. That does not, of course, mean that there is no international law provision that would apply to a particular weapon that uses nanotechnology. So, for example, if a nanotechnology weapon were to be developed which injures using fragments that escape detection in the human body using X-rays, Protocol 1 to the Conventional Weapons Convention would need to be considered. If, hypothetically speaking, a nanotechnological weapon were to injure by means of fragments which can be detected by X-rays but if the medical treatment of the injuries, including the medical handling of the fragments, is impeded by some other factor special to nanotechnology, the question that the weapons reviewer would need to consider is whether the associated additional suffering and/or injury are, respectively, unnecessary or superfluous. Similarly, if nanotechnology were to enhance the capabilities and strength of laser weapons, the lawfulness of the resulting weapon system would have to be judged in the light of established legal rules, for example, Protocol IV to the Conventional Weapons Convention.

It is not at the time of writing clear to the author whether nanotechnology will be used to create substances that span the division between toxic chemicals as defined in Article II(2) of the Chemical Weapons Convention and microbial and other biological agents and toxins as referred to in Article 1(1) of the Biological Weapons Convention. If using the science of nanotechnology were to enable materials to be created that span these two treaty regimes, it would be necessary to consider whether the substance in question is regulated by one of these treaties, by both or by neither. A person undertaking a weapon review can only apply the treaty definitions in good faith to the substance that is before him, and reach an objective conclusion as to which legal regime(s) apply.

Some have suggested that by means of nanotechnology substances may be created that combine biological and chemical features but in such a way as to come within neither the Chemical[122] nor the Biological Weapons Conventions.[123] Much would depend on what the characteristics of the actual substance is, what if any its

[121] Nasu 2012, p. 655. Hitoshi Nasu cites as examples of such materials multi-walled carbon nanotubes, silver nanomaterials, titanium dioxide nanoparticles, nanoparticle zinc powder, cobalt nanoparticles and nickel nanoparticles; see further Nasu 2012, pp. 655–656, 657–659. For the application of the superfluous injury/unnecessary suffering rule to nanotechnology, see Nasu 2012, pp. 661–665.

[122] Consider for example Pardo-Guerra and Aguayo 2005.

[123] Consider Pinson 2004.

harmful effects comprise, and whether those harmful effects arouse international concern. If such concern is aroused, it will be for states to determine whether it can be adequately addressed by adding relatively brief supplementary provision to whichever of the two treaties is most appropriate. If that is not either feasible or appropriate, it will also be for states to decide whether the concern should be addressed by the negotiation of ad hoc treaty law or whether some other way of addressing the matter is more appropriate. The route to be pursued will depend on the precise nature and degree of international concern, which in turn will be informed by the characteristics of the substance in question.

More generally, if nanotechnological developments in the peacetime environment give rise to pressing international concerns, it will, again, be for states to consider whether international law needs to be developed in order to address that concern. It would in the author's view be difficult to achieve agreement among states to such legal provision until the costs and benefits associated with the technology are more widely and publicly understood. Treaty provision on the topic is only, in the author's view, likely to become a realistic prospect in the event of some sufficiently troubling event that galvanizes international opinion in favour of legal regulation, and it remains to be seen whether the focus for any such concern would centre on military applications or on the technology as such.[124]

5.6.4 Outer Space Weapons

In this section, we consider weapons that operate entirely in outer space which has been described as commencing above the highest altitude at which an aircraft can derive lift from its interaction with the air, and below the lowest possible perigee of an Earth satellite in orbit.[125] We are not concerned, for example, with inter-continental

[124] For a discussion of various possible approaches to the international regulation of the deployment and use of nanotechnology in the military sphere, see Nasu and Faunce 2009/2010, pp. 51–53 and see Robert Pinson's discussion of the extent to which the Chemical Weapons Convention and Biological Weapons Convention apply to nanotechnology and see his conclusion that both regimes are inadequate to deal with foreseeable issues. He proposes an all-embracing treaty regime to cover all aspects of the new technology in relation to weapons and emphasizes the importance of universal participation, which is of course likely to be impossible to achieve during the period immediately following the adoption of any such treaty text; Pinson 2004, pp. 290–308.

[125] NWP 1-14 M, United States Naval Commanders' Handbook on the Law of Naval Operations, para 1.10 and UK Manual, p. 312, para 12.13 but see Multinational Experiment 7 Report, Protecting Access to Space, December 2012, accessible at http://mne.oslo.mil.no:8080/Multinatio/MNE7produk/21Protecti/file/Protecting%20access%20to%20Space%20%28from%20DCDC%20webportal%29.pdf, para 106 and Multinational Experiment 7 Report, Space: Dependencies, Vulnerabilities and Threats, UK Ministry of Defence 2012, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/33689/20120313mne7_space_vulnerabilites.pdf, paras 201–211 for the complex considerations to be taken into account in determining the boundary between airspace and outer space. Airspace is subject to the exclusive

ballistic missiles that enter outer space for part of their trajectory but that do not go into orbit. It is the importance of outer space for numerous functions vital to the operation of modern societies[126] that also renders it a medium likely to be a focus for future conflict.

All uses of outer space must, according to Article III of the Outer Space Treaty,[127] be "in accordance with international law". We can take it from this that the rules of weapons law discussed earlier in this chapter therefore apply to weapons that are used, designed for use or intended for use in, to or from outer space. The weapons technologies that are liable to be used to undertake offensive military operations in outer space comprise direct attack using kinetic or cyber means, electronic attack in the form of jamming or spoofing, laser blinding and electromagnetic pulse attack.[128] As in Sects. 5.6.1, 5.6.2 and 5.6.3, we will therefore take the criteria that are applied in weapons reviews, and discuss their application to outer space weapons.

The superfluous injury/unnecessary suffering principle is unlikely to be relevant to a weapon the operational effects of which are limited to outer space. If an outer space weapon were to be designed so as to operate from space but to have wounding, injuring or damaging effects on the Earth's surface, the superfluous injury/unnecessary suffering criterion should be applied in the same way as was explained earlier in this chapter.

The indiscriminate weapons criterion is likely to be an important issue when considering certain outer space weapons. Space debris is widely recognized as a significant problem[129] and kinetic anti-satellite missiles are among the causes

(Footnote 125 continued)
jurisdiction of subjacent territorial States, Chicago Convention on International Civil Aviation, Chicago, 7 December 1944, Article 1. Contrast outer space, which for practical purposes starts at an altitude of approximately 100 km and is not subject to national sovereignty; AMW Manual, Commentary accompanying Rule 1(a), para 5.

[126] The MNE 7 Protecting Access report, n. 125 above, para 114, refers to four space pillars to describe the types of capability that space can provide, namely position, navigation and timing; satellite communications; intelligence, surveillance and reconnaissance; and space situational awareness. As to the wider military and civilian utility of facilities provided from outer space, see generally MNE 7 Dependencies, Vulnerabilities and Threats Report, n. 125 above.

[127] Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967 (Outer Space Treaty).

[128] MNE 7 Protecting Access Report, UK Ministry of Defence 2012, paras 123–127.

[129] See MNE 7 Protecting Access Report, n. 125 above, at para 121 and consider the use of an SC-19 interceptor by China on 11 January 2007 to target and destroy its Fengyun-IC weather satellite by colliding with it head on and at high speed at an altitude of 860 km allegedly generating 2,600 items of trackable debris and up to 150,000 smaller but hazardous fragments in a swarm ranging from 200 to 2,300 km in altitude; Koplow 2008, pp. 1203, 1211 citing Kan 2007. Note also US Satellites Dodge Chinese Missile Debris, Washington Times 11 January 2008 at A1. Consider also the 20 February 2008 US ballistic missile attack on its falling USA-193 satellite at an altitude of 150 miles; due to the relatively low altitude most of the 3,000 potentially hazardous fragments reportedly left orbit; Koplow 2008, p. 1210.

identified in the MNE-7 Experiment report.[130] It is the very high speeds at which fragments in orbit travel that cause them potentially to be so damaging and this risk of damage will probably be persistent because of the tendency of objects to remain in orbit for protracted periods. An outer space weapon that is of a nature to create a cloud of debris that will be persistent and that may be expected to cause damage to other space vehicles may therefore be hard to reconcile with the prohibition in Article 51(4)(c) of AP1.[131]

Designing a weapon to attack satellites in outer space will also involve due consideration of the indiscriminate weapons rule from another perspective. Thus, if for example a satellite of the sort the weapon is being designed to attack carries numerous transponders each of which may be expected to carry civilian and military communications traffic, an outer space weapon that is only capable of knocking out the satellite as a whole might be regarded as indiscriminate by nature in that it "cannot be directed at a specific military objective", namely the particular communications link that constitutes the object of the attack, and instead "is of a nature to strike" military and civilian communications links "without distinction".[132]

Indeed, depending on the number of different links and networks hosted by the relevant transponder, designing a weapon to attack and destroy a specific transponder on a satellite may also be regarded as breaching the indiscriminate attack rule on the same basis, and due account of this would need to be taken when outer space weapons are being developed.[133] This may suggest to some observers that cyber methods that can engage directly the specific network or link that is of interest are less likely to breach the indiscriminate weapons rule.

While both environmental protection criteria should be considered in relation to any weapon that is being reviewed, whether it is an outer space weapon or some other sort of weapon, the prohibition on widespread, long-term and severe environmental damage would seem unlikely to be relevant to weapons operating in outer space. However, any weapon that is located in outer space and that uses outer space itself, or any other of the environmental elements listed in Article II of ENMOD, as a weapon to cause widespread, long-lasting or severe effects as the means of destruction would breach the ENMOD treaty prohibition, assuming other relevant elements of the prohibition arise.

There are no rules of the law of armed conflict that prohibit or restrict the use of outer space weapons as such. Law of armed conflict rules relating to particular technologies may, however, require consideration depending on the particular nature of an outer space weapon that is to be reviewed. So, for example, if a

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[130] MNE 7 Protecting Access Report, n. 125 above, at para 102. Note that concentrations of debris have reached a level that risks generating a chain reaction that would deny access to areas of outer space entirely; Protecting Access Report, n. 125 above, para 103.

[131] Koplow 2008, p. 1245.

[132] See API, Article 51(4).

[133] This would certainly be the case if either of the rules in Article 51(5)(a) or (b) of API were as a result to be breached.

conventional laser weapon is to be used to, in or from outer space, consideration should be given to the prohibition, in Protocol IV to CCW, of blinding laser weapons. This prohibition will, however, only be breached if the outer space laser weapon were to be designed, as one of its combat functions, to cause permanent blindness to unenhanced vision.[134]

For completeness, reference should be made to Article IV of the Outer Space Treaty under which States party undertake:

> not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.[135]

So, the Outer Space Treaty does not prohibit the deployment of conventional weapons[136] in outer space and does not prohibit the entry of nuclear weapons and weapons of mass destruction into outer space, for example, as part of the trajectory of an inter-continental ballistic missile. It is the stationing in outer space of nuclear weapons and weapons of mass destruction that is the focus of the treaty prohibition.

The reference to weapons of mass destruction would seem to refer to chemical weapons within the meaning of the Chemical Weapons Convention and to biological or bacteriological weapons within the meaning of the Biological Weapons Convention.[137]

5.7 Weapons Law and the Legal Spectrum of Conflict

Having considered how weapons law will affect the development of new weapons, we should now consider another theme of this book, the evolving spectrum of conflict, in relation specifically to weapons law matters. In Sect. 5.7.1, we will look at the current conflict spectrum and the differences in weapons law as it

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[134] Note, however, that a more general provision in the Protocol requires that in the employment of laser weapons, all feasible precautions must be taken to avoid the incidence of permanent blindness and that these precautions shall include training of the armed forces and other practical measures; Protocol IV, Article 2. Note that a laser weapon that may cause blinding as a collateral effect of the otherwise legitimate use of laser systems does not breach the Protocol; Protocol IV, Article 3.

[135] Outer Space Treaty, Article IV(1) and (2).

[136] Conventional weapons in this context means weapons that are not nuclear weapons or weapons of mass destruction.

[137] As to the rationale underlying the treaty provision, see Bentley 2013, pp. 68–97.

applies to the different classes of conflict. Then, in Sect. 5.7.2, we will look at the suggested alterations in the spectrum and will discuss what implications those changes may be expected to have in the weapons law field.

5.7.1 Weapons Law and the Current Legal Spectrum

Armed conflicts to which common Article 2 to the Geneva Conventions applies are international armed conflicts and the weapons law discussed in earlier sections of this chapter applies in full to such conflicts.

Conflicts to which Article 1(4) of API applies are, for states party to API, treated as if they were referred to in common Article 2. This means that treaties, such as CCW, which define the scope of application by reference to Common Article 2,[138] will apply also to Article 1(4) conflicts for states that are party to API. The arms control treaties will apply to Article 1(4) conflicts anyway. That does not of course alter the fact that Article 1(4) conflicts are not international in character and this means that for all states including those party to API, weapons law treaties that explicitly limit scope to conflicts between states will not, as a matter of treaty law, apply to Article 1(4) conflicts.[139]

There are certain differences in the weapons law rules that apply respectively to international and non-international armed conflicts. These differences are narrowing with time, and much of the law applies equally as between the two classes of conflict. In the next paragraphs we will consider the similarities and the differences.

The core superfluous injury and unnecessary suffering and indiscriminate weapons principles, explained earlier in this chapter, apply equally in both types of conflict. Furthermore, the Conventional Weapons Convention (CCW)[140] and its Protocols apply equally in both classes of armed conflict for the 77 states[141] that

[138] States that have ratified the 2001 extension in scope of application of CCW are bound by the Convention and by the relevant Protocols in relation to international and non-international armed conflicts; see note 131.

[139] Associated customary rules may well apply to such conflicts. Examples of relevant treaties would be 1899 Hague Declaration 2 (asphyxiating gases), 1899 Hague Declaration 3 (expanding bullets), 1907 Hague Convention IV, 1925 Geneva Gas Protocol and, it seems, the 1976 ENMOD Convention.

[140] The Convention originally applied to armed conflicts covered by Article 2 common to the Geneva Conventions of 1949 but an amendment agreed at the 2001 CCW Review Conference extended the scope of application, for the states that ratify the extension, to non-international armed conflicts.

[141] www.icrc.org, treaty database, viewed on 22 September 2013.

have ratified the 2001 extension in scope of the Convention. Amended Protocol II to CCW as originally adopted applies to both categories of conflict.[142]

The arms control treaties to which we referred earlier in the chapter, namely the Chemical Weapons Convention, the Biological Weapons Convention, the Ottawa Convention and the Cluster Munitions Convention were all so drafted as to apply to both classes of conflict.

Where expanding bullets are concerned, the law was most recently considered at the Kampala Review Conference for the Rome Statute of the ICC in 2010. On 10 June 2010 resolution 5 of that Conference inserted into Article 8(2)(e) (which lists war crimes applying to non-international armed conflicts under a heading referring to the "established framework of international law")[143] the following additional offence: "(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[144]

The 1899 Declaration that prohibited expanding bullets was subject to a general participation clause, meaning that it applied exclusively to a war between states party and ceased to apply if a non-party state joined the conflict.[145] The terms of the amendment to the Rome Statute noted above might at first glance appear to suggest that an absolute prohibition of such ammunition was regarded by the states discussing the issue in Kampala as having customary law status in its application to non-international armed conflicts.

Christopher Greenwood has, however, reportedly doubted that the 1899 Declaration was customary law. He referred to the distinction principle and contemplated the sort of expanding ammunition which may be more accurate or less likely to ricochet or over-penetrate than full-metal jacketed ammunition and which thus would reduce the risks to innocent civilians during urban or counter-terrorist operations. He speculated whether, in such circumstances, some increased potential for injury for the combatant or terrorist target would necessarily amount to superfluous injury. Would the protection of civilians under the principle of distinction in such circumstances outweigh considerations of additional injury to the targeted individual?[146]

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[142] APII, Article 1(2).

[143] Referring to 'the established framework of international law' indicates that such activity, if conducted in relation to a non-international armed conflict, is only an offence if it is done in a way that breaches that established framework.

[144] RC/Res.5 (advance version), Annex 1, p. 3 dated 16 June 2010. For a discussion of the legal significance of this amendment see Vanheusden et al. 2011, p. 535.

[145] 1899 Hague Declaration 3, operative paras 2 and 3. See also Hays Parks 2005, p. 69.

[146] Comments attributed to Professor Greenwood during a keynote speech, Legal Aspects of Current Regulations, Third International Workshop on Wound Ballistics, reported by Hays Parks 2005, pp. 89–90. See also Henckaerts J-M and Doswald-Beck L 2005, vol I, which finds a customary rule prohibiting expanding bullets in both classes of conflict, Rule 77, p. 268, but which notes the use of such ammunition by some states for law enforcement purposes; Henckaerts J-M and Doswald-Beck L 2005, p. 270, and consider Watkin 2006, p. 52.

The Kampala resolution, moreover, includes a preambular paragraph:

> Considering that the crime proposed in Article 8, para 2(c)(xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law.[147]

The reference to 'uselessly to aggravate' in the Preamble suggests that if the use of expanding ammunition has additional military utility beyond that which ordinary ammunition would yield, the offence will not have been committed.[148]

So the weapons law treatment of expanding bullets seems to differ somewhat as between international and non-international armed conflicts because the treaty prohibition, which only relates to the former, makes no reference to superfluous injury or unnecessary suffering.

States party to the Conventional Weapons Convention that have not ratified the scope extension will only be bound in relation to international armed conflicts. This may have the result that rules reflected in the CCW Protocols achieve customary status more slowly in relation to non-international armed conflicts than in relation to international armed conflicts, which would of course represent another point of weapons law difference between the two classes of conflict.

ENMOD only applies if the destruction, damage or injury is applied by one state party to another, with the consequence that the treaty will only apply to armed conflicts between states. Articles 35 and 55 of AP1 apply to states that are party to the treaty and only in relation to international armed conflicts and to conflicts to which Article 1(4) of API refers. The content of any customary weapons law rules relating to the environment is a matter of controversy.[149]

The weapons law rules that apply in non-international armed conflicts do not differentiate between conflicts to which only Common Article 3 applies and those also regulated by Additional Protocol II.

Moving further along the spectrum of conflict, however, there is a fundamental difference in legal provision if the conflict does not reach the threshold of armed conflict. In that circumstance, the applicable law is the domestic law of the relevant state as supplemented by human rights law. The law of armed conflict rules relating to weapons will not apply. Instead, the weapons that it will be lawful for a

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147 Resolution RC/Res.5, Advance Version, dated 16 June 2010 preambular para 9.

148 The elements of the relevant war crime include that the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect. Resolution RC/Res.5 at Depository Notification C.N.651.2010 Treaties-6 dated 29 November 2010, available at http://treaties.un.org.

149 See Boothby 2009, pp. 100–103, Boothby 2012, pp. 204–205. Sandesh Sivakumaran argues that such an alignment in the environmental protection rules between international and non-international armed conflict would be welcome, and suggests that if there is truly to be a holistic law of non-international armed conflict, areas of international environmental law need to be embraced more fully than at present; Sivakumaran 2012, pp. 527–528.

state to issue to its internal security personnel, such as the police force, must be consistent with the general requirement in human rights law to restrict the use of force in law enforcement to that which is absolutely necessary.

Domestic law may provide exemptions for the security forces, but the fundamental principle remains that the state's acquisition of weapons for internal security purposes must be such as enables the degree of force used to be kept to the absolute minimum consistent with addressing the relevant circumstances.

5.7.2 Weapons Law and Changes in the Legal Conflict Spectrum

If, as seems unlikely, Article 1(4) of API were to be revoked, this would have the effect that the weapons law applicable in non-international armed conflict would thereafter regulate the weapons that may be used in such conflicts. This would only have a practical effect to the extent of the relatively minor differences in law noted in Sect. 5.7.1.

In the similarly unlikely event that the distinction between non-international armed conflicts to which Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, also adopted in Geneva on 8 June 1977 (APII 1977) does, and respectively does not, apply is brought to an end, with the result that a single classification of non-international armed conflicts is produced, this would have no appreciable effect on weapons law, as weapons law already applies in the same way to both kinds of non-international armed conflict.

The differences in the law applying to international and non-international armed conflicts continue to narrow, and this process seems likely to continue in relation to weapons law. Whether States will be willing to end the limited remaining points of difference remains to be seen.

There seems to be no basis for suggesting that the current distinction between the weapons law that applies to non-international armed conflict and the domestic and human rights law provisions that govern the weapons that may be used in law enforcement is inappropriate. Rather, this distinction would seem to have its roots in the fundamentally different legal regimes that apply, respectively, to the two classifications of conflict and is therefore likely to persist.

5.8 Conclusions

Anyone reading this chapter may be tempted to wonder how a set of in bello rules can be developed that makes practical sense in the context of the increasingly disparate levels of technological sophistication being devoted to armed conflict. Is it fair that the same weapons law rules apply to the most technologically advanced

as to the least well equipped? Is our view affected if technological inferiority is the result of a particular state's choice not to invest in up to date, discriminating weapons technology? Would any attempt to introduce more exacting weapons law rules as to discrimination fail because of the possibility for states simply to circumvent the more exacting rules by keeping investment in new weaponry low? Does it actually matter that the less sophisticated are effectively penalized in relative terms—who said the law would ever prescribe a fair fight—or is the real issue the tendency of the asymmetrically inferior, confronted with perceived unfairness of this sort, to go to the edge of the law, or even beyond it, in order to seek to contest effectively.

Weapon reviews are the mechanism whereby all states are obliged to apply the existing law, as it applies to them, to new weapons. Weapons law will, in the author's view, continue to apply similarly to all states for the foreseeable future. Where new technologies challenge existing legal provision, the law will only change if states see the need for such change. Robert Heinsch cites the recent difficulties in negotiating treaty rules in relation to cluster munitions[150] and the reluctance of states to discuss legal regimes for new technologies as possibly meaning that customary law could adapt to the challenges of the new technologies.[151]

The existing weapons law rules aim to protect both those participating in the fight and those who should be protected from its effects. Compliance is the responsibility of states, and while they may not all yet have recognized weapon review programmes, this situation should improve with time.

This state-centric approach to compliance with the law ignores, however, the increasing involvement in the use of force of non-state actors, and the increasing availability to them of modern weapons technologies. When, for example, such actors have free Internet access to the STUXNET tool and can adjust it at will to suit their own purposes, or when for example they can acquire, re-engineer and employ DNA-linked viruses or genetic mutation tools, such possibilities are likely to have the most profound consequences for the security of states. There seems to be little prospect of states agreeing to the inclusion of non-state, organized armed groups in discussions or negotiations relating to weapons law issues. Furthermore, constraining the rate or direction of scientific development is likely to be challenging, given the secrecy that, as we have noted, surrounds the development of new technologies, particularly those with potential weapons applications. And yet common sense suggests that international peace and security is likely to be enhanced if some technologies either do not materialize or, if they do appear, at least if the access to them is severely limited.

These are complex issues. It would seem, however, that technological advance is making it increasingly important that the international community should

[150] Indeed one could also refer to the failure during Conventional Weapons Convention discussions in Geneva in 2006 to secure a treaty making modest provision as to mines other than anti-personnel mines; personal knowledge of the author who was then a member of the UK delegation.

[151] Heinsch 2013, p. 37.

continually monitor developments in the weaponisation of emerging technologies, and should be in a position to act collectively and in a timely way should the need arise. One wonders whether the UN, perhaps acting through the CCW, the Conference on Disarmament or using some other, suitable agency, might be a ready-made and potentially appropriate vehicle for international consultation of this sort. This would only work, however, if there were to be a sufficient international appetite, and that might involve an uncharacteristic willingness of states to discuss all aspects of the emerging problem, including vulnerabilities, with a view to achieving greater collective security. If states, as is likely, are unwilling to admit non-state organized armed groups to such consultations, perhaps representatives of 'civil society' should participate as a way of ensuring that the discussions are as well-informed as possible.

The customary principles and established rules of weapons law will continue to provide important safeguards for combatants and civilians during future armed conflicts, including those involving novel weapons. Proper compliance with the law in the weapons field, as in other international humanitarian law contexts, remains the priority, and it is therefore a matter for concern that too few states appear to implement their weapon review obligations in a systematic way. It is also, however, important that the law should not be overtaken by technological advance so international weapons law-making structures must become sufficiently agile to address future dangers. Perhaps therefore, and this is mentioned merely as an option that should be considered, the time is approaching when consensus should no longer be a pre-requisite to the adoption of Protocols under CCW. Whatever measures are considered, however, the objectives should be the establishment of a mechanism for continuous international monitoring of developments in weapons technology coupled with responsive law-making arrangements that can ensure that the law remains relevant in an era when the pace of scientific advance seems to be accelerating.

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Chapter 6
Legal Implications of Emerging Approaches to War

Contents

6.1 Introduction

In Chap. 5, we looked at the law relating to weaponry and considered how it impacts upon new weapons technologies that are either in development or on the horizon. In this chapter, we look at certain features of the likely conduct of future warfare and ask what the legal implications will be. It is always tempting to suggest that events that seem difficult to reconcile exactly with what went before constitute such a dramatic change as to herald the arrival of a new and different strategic state of affairs. Frequently, an examination of history reveals that what we thought of as a break from the past becomes an adjusted manifestation of a trend that may have been developing for some time, or a reinvention of phenomena that were in evidence, perhaps in a subtly different form, many years ago.[1] That what we saw as

[1] Azar Gat, for example, notes that "although the world has been living with nuclear, biological and chemical weapons for generations, the continued proliferation of the technologies in question, as well as the revolutionary advances in biotechnology, renders unconventional terror a far more likely prospect"; Gat 2011, p. 45.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_6,

new in fact has links with the past does not, of course, per se deprive the novel aspects of legal significance. The strategic debate as to the nature of 'new wars' and whether they really are 'new' is therefore of limited relevance to the current chapter and book. Of greater relevance is the degree to which some evolving ways of conducting conflict challenge, or are challenged by, the applicable law.

So, looking at these matters in slightly more general terms than is perhaps normal, we ponder whether changes that we are seeing in the methods of warfare are indeed something that is radically new or merely a further step in a historical continuum of change and of scientific improvement.

This sort of discussion is going to be assisted if we can identify themes that characterize the changes that we observe in the conduct of international tensions, crises and warfare. It therefore makes sense to start by looking at tensions that lead to armed conflict, asking whether these now arise for reasons that are fundamentally different to those that applied in the past and whether such tensions take a significantly different form to those experienced in the past? The answer seems to be that tensions within states continue to arise for essentially familiar reasons. These causes of conflict may be many and varied, with any single conflict having numerous, often highly complex causes. Indeed the parties to a conflict are likely to have diverging perceptions as to the causes of the conflict between them. Of the very many causes of conflict, a very few examples would include: the thirst of a minority group within a state for independence,[2] tensions associated with perceived inequality in access of elements of the population to power and resources[3]; ongoing conflict in former colonies where stable, inclusive and accepted government has failed to take root and division surfaces on the basis of ethnic, racial, tribal or religious division or in which secession is attempted[4]; sectarian divisions associated with or giving rise to ethnic cleansing[5]; criminal enterprises including

[2] Consider the tensions in South Ossetia in 1990 when its autonomous status was summarily abolished by the President of Georgia and the ensuing armed conflict in 1991; Global Security—South Ossetia—Background, available at www.globalsecurity.org/military/world/war/south-ossetia-3.htm.

[3] Consider the origins of the 'troubles' in Northern Ireland in which civil disturbances in Belfast and Londonderry led to the deployment of the British Army to the Province in 1969 after which three phases of the conflict were observed, namely its outbreak and militarization from 1969 to 1976, its criminalization from 1977 to 1994 and the period of transition from 1995 to 2004; Campbell 2005, p. 326.

[4] Consider, for example, the wars in the Congo which were preceded by periods of tension between tribal groupings before March 1993 fuelled by contested land ownership and use issues in the province of North Kivu. Violence during the period to 1996 gave way to the First Congo War from July of that year until July 1998 and the second Congo War which lasted until July 2003; see generally Reyntjens 2009. Note also the attempted secession of the self-proclaimed Republic of Biafra from Nigeria that gave rise to the Nigerian Civil War from July 1967 to January 1970.

[5] Consider for example the ethnic tensions that precipitated the armed conflict in the Former Yugoslavia from 1992 to 1995 and the Kosovo War from 1998 to 1999 and the forceful displacement of civilians on ethnic grounds that characterized both conflicts; see for example Waterfield 2012, available at www.telegraph.co.uk/news/worldnews/europe/serbia/9268538/Mladic-intended-to-ethnically-cleanse-Bosnia.html.

gun running, diamond dealing, Mafia-type activities, and terrorism,[6] invasion[7] and action pursuant to a UN Security Council Chapter VII mandate.[8] These are only a very few of the very many factors that have spawned the growth of tensions within states that have led to armed conflicts.

The incident that precipitates internal tensions may be national or regional in character, such as a disputed election,[9] or local, such as criminal activities of a particular group of individuals such as a drug gang.[10] Sometimes protests and demonstrations against dictatorial authority give rise to violence, instability and internal conflict.[11] The violence may be linked to control of resources, or may be funded by raw materials such as diamonds gained by force.[12] Cliques, whether defined on ethnic, religious, tribal or other grounds, that currently hold power, wealth, resources and/or influence are understandably reluctant to yield them up to more equitable distribution thus surrendering their own authority and sources of wealth. The 'have nots' are confronted with a 'fight or suffer' choice, and when situations become sufficiently desperate, violent resistance is seen as the obvious option.

Sometimes the tension within a state is between the national policing and/or internal security forces of the state and a group or groups that are opposing the government. The tensions take the form of riots, criminal activities, marches and demonstrations centred on governmental buildings, individual acts of violence, isolated terrorist incidents and events of a similar nature. Sometimes governmental

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[6] See for example Crane 2005, p. 21 describing the unrest and armed conflict in the West African region as 'criminal warfare'.

[7] Consider the Argentinian invasion of the Falkland Islands on 2 April 1982 and the military operation by the UK armed forces in the same year that involved the sending of a naval task force and the conduct of sea, land and air operations to recover the islands; see for example Woodward 2012.

[8] Consider for example the coalition operations from August 1990 to February 1991 pursuant to UN Security Council Resolution 678 of 29 November 1990 which, if Iraq did not implement Resolution 660 by 15 January 1991, authorized the use by Member States of the UN of all necessary means to uphold and implement Resolution 660. A US-led coalition of military forces conducted military operations pursuant to that authority to remove Iraqi forces from Kuwait.

[9] Consider tensions and violence following a disputed election in Kenya in 2007; see Gettleman 2007, available at www.nytimes.com/2007/12/31/world/africa/31kenya.html?pagewanted=all.

[10] See for example Grillo 2012, available at www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/9046441/Mexicos-drug-war-has-brought-terrifying-violence-to-the-streets-and-taken-a-dreadful-toll-of-lives.html.

[11] Consider the protests on 15 February 2011 in Benghazi, Libya against the government of Colonel Muammar Gaddafi which rapidly led to clashes between protesters and the security forces, to an uprising and to open civil armed conflict; see for example Libyan uprising one year anniversary: timeline, Daily Telegraph 2012, February, available at www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9087969/Libyan-uprising-one-year-anniversary-timeline.html.

[12] Consider for example the role of diamonds, often referred to as 'blood diamonds', in financing participants in wars in Africa; see for example, Reuters 2001, Diamonds slow Sierra Leone Peace, 25 November 2001, available at www.globalpolicy.org/component/content/article/182/33798.html.

overreaction stokes the feelings of disaffection. Demonstrations seeking governmental concessions escalate into violent disorder.[13] Peaceful protest that goes unanswered begets violent protest that generates intransigence and violent repression.[14] Mutual hostility is stoked as casualties are suffered on both sides and the room for compromise and reasonableness shrinks. It is an all too familiar route that seems unlikely to disappear any time soon. Armed groups may compete within a state or failed state for power, or an insurgency that unseats the government of a state may then descend into civil strife between factions of the former opposition.

There is, frankly, nothing new in all this. Scholars of events in the Indian subcontinent in the 1940s, of events in Indo-China in the 1950s and 1960s, of tensions in Northern Ireland in the 1960s and early 1970s and of any number of conflicts in Africa, Asia, South America and elsewhere will all recognize the features that are described here.

In the future, tensions seem likely to continue to arise within states for essentially similar reasons. Dictators will continue to generate dissatisfaction that boils over into civil unrest. Racial, ethnic, religious and other groups will continue to seek unfair advantage for themselves at the expense of others, and organized groups within a state will continue to dispute among themselves in a quest for power, authority and influence. While the transplantation of Westminster or Washington-style democracy is unlikely to be a recipe that suits many, certainly not most, societies in turmoil, a less ambitious, gradual evolution towards a more inclusive, pluralistic and thus more widely acceptable governing process at whichever level(s), local, regional or national, that suit the locus in quo, may reduce some tensions.

Tensions are matters "which are essentially within the domestic jurisdiction" of a state.[15] So, while neighbouring states may have sympathies with one or other of the contending groups involved in such tensions, unless invited to do so by the government of the state, any forcible involvement in the relevant events by a foreign government would amount to unlawful interference in the internal affairs of the state.[16]

However, a government confronted with such tensions falling short of armed conflict may seek assistance from another state, in which case the personnel of that other state must act in accordance with the law of the territory where their activities take place, in accordance with such domestic law of their own territory as

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[13] The descent of Syria via protest and demonstration into violence and thence into civil war from 2011 to 2013 would seem to exemplify this kind of process; Wiersema 2013, available at http://abcnews.go.com/Politics/syrian-civil-war/story?id=20112311.

[14] Consider for example the violence that Col Gaddafi threatened to employ in Benghazi in 2011; McGreal 2011, available at www.theguardian.com/world/2011/mar/16/benghazi-braces-battle-libya-endgame.

[15] The United Nations, and indeed other States, are bound not to interfere forcibly in matters which are essentially within the domestic jurisdiction of a State; UN Charter, Articles 2(4) and (7).

[16] See No. 15 above.

applies to them[17] while so engaged, and in accordance with applicable human rights law. The international arrangements under which the foreign personnel, military or civilian, are deployed will usually include provision as to which state is to have jurisdiction to deal with crimes committed by them and as to related matters. If they are deployed to assist the domestic police authorities, they will usually be restricted to using only necessary force in self-defence and minimum force in discharging their mission.

Chapter VI of the UN Charter addresses the pacific settlement of disputes which, if they continue, are likely to endanger the maintenance of international peace and security.[18] It includes specific provision for investigation of such disputes by the Security Council and for the making by the Security Council of recommendations for the resolution of such disputes. Chapter VI also provides for the reference of such disputes to the International Court of Justice and to the Security Council by the parties involved if the matter of dispute has not been resolved by the application of Chapter VI arrangements.[19]

If the UN Security Council determines under Article 39 of the UN Charter that a "breach of the peace, threat to the peace or act of aggression" has taken place, it shall act in accordance with Chapter VII of the Charter to maintain or restore international peace and security.

When, as foreseeably they will, approaches to the UN Security Council or to the International Court of Justice either do not take place or fail to prevent the development of the crisis into an armed conflict, will the conduct of such future conflicts be significantly different to what we have known hitherto and if so, will these differences have legal implications?

6.2 Enduring Methods of Warfare and 9/11

The first and most important point to make is that violence will continue to be employed as a way of determining disputes within and between states and the purpose of that violence will continue to be the imposition of the will of one party to the conflict on the other. Humanity has yet to operate a more sophisticated way of resolving differences that diplomacy, consultations within a state, mediation, international litigation before institutions such as the ICJ or other similar activities fail to resolve. The depressing truth is that when talking fails to produce an

[17] For example the military or other code that applies to the force of which they are members.

[18] UN Charter, Article 33. The parties to such a dispute must first "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" and the Security Council can call upon them to do so; ibid.

[19] As to investigation, see Article 34; as to recommendations see Article 36(1); as to reference of the matter of dispute to the International Court of Justice see Article 36(3) and as to reference of the matter to the Security Council by the parties, see Article 37(1).

outcome that satisfies both sides of a dispute and if the matter in contention is regarded by those closely affected by it as being of sufficient import, there will always be the risk that armed violence will be employed as the way to address the points of difference. Guns, bullets, bayonets, knives, bombs, mortars, missiles, rockets and similar means will continue to be used and the contest will take a similar form to that which we have experienced all too frequently in the past.

This is vitally important. The traditional rules regulating the conduct of hostilities will all continue to make sense because they were fashioned by reference to methods and means of warfare that will continue to be employed. When we speak of modern technology driving a 'changing nature of conflict', what we are in truth referring to, therefore, is a change in the nature of a few conflicts in which the technologically most sophisticated states participate and choose to use novel methods and means. Even in those conflicts, traditional military operations will continue to be undertaken. So the 'change' really consists of new methods of warfare that add to the military options available to commanders of technically advanced forces when they decide how to prosecute the hostilities.

Much discussion of the changing nature of conflict has focused on the attacks on New York and Washington on 11 September 2001. The view is taken by some that "[t]he war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed"[20] or that '9/11 changed everything'.[21] From a legal perspective, one could debate whether it was the 9/11 attacks or the US response to those attacks that marked a strategic change and one could then assess whether the observed changes really constitute a changed paradigm. Much has been written on these specific issues and it would be beyond the intended scope of the present section to rehearse that debate here; what follows in the next few paragraphs is therefore a very abbreviated appreciation of some core issues.

Looking first at the attacks themselves, terrorism was not a new phenomenon in 2001.[22] The scale and highly coordinated nature of the 9/11 attacks, perpetrated by individuals somewhat loosely associated with one another, seem to be the features that might be seen as marking these events out as qualitatively different to what had previously been seen. Audrey Cronin, however, notes both new and old features to Al Qaeda. Its hybrid structure, with a central core, nebula and

[20] War Crimes at Large, Ambassador Richard Prosper Address at Chatham House, London, on 20 February 2012.

[21] See for example Morgan 2009.

[22] Consider for example terrorist hijackings of airliners in the 1960s, the Northern Ireland 'Troubles' from 1969 until the mid-1990s, the ETA Campaign in Spain and the Rote Armee Faktion/Baader Meinhof attacks in Germany. Consider also Sir Michael Rose's observation that "President Bush authorized the employment of means previously thought to be needed only for the conduct of general war to fight what others have regarded as an extreme form of criminality"; Rose 2012, p. 167 at p. 169. General Sir Michael considers four levels of war, general war, limited war, insurgency war and peacekeeping operations and argues that each should not only be clearly defined but should also have its own set of legal rules; Rose 2012, p. 175. The danger, however, is that a proliferation of discrete sets of legal rules may produce a level of legal complexity that would render compliance more rather than less difficult to achieve or maintain.

indigenous volunteers, its radicalization and recruitment methods, its means of communication, elasticity, staying power, deep global reach and fluid operational style based on central command with a common mission statement and a brilliant media campaign facilitated by the means of globalization are identified as its 'new' characteristics. 'Old' characteristics include classic popular mobilization techniques, "a networked structure that echoes Greek resistance to the Ottoman Empire", the nationalist and anti-colonialist narratives of some associated groups and more traditional challenges faced by other terrorist groups.[23]

The scale of a terrorist incident does not cause it to cease to be a crime, or series of crimes, so all those involved as conspirators, accessories to and facilitators of the crime are just as liable to investigation, prosecution and punishment as the detonators of the bomb, the hijackers of the aircraft or the persons using the firearms. Equally, coordinated crimes do not cease to be offences simply because of that element of coordination. The number and apparent coordination of the attacks would only cause them to become, or to be seen as the commencement of, a non-international armed conflict if, alone or in association with other events, they involve an armed group that can properly be described as 'organised' and if the events constitute protracted armed violence against the government of a state or between organized armed groups within a state.[24]

If the relevant events cannot properly be described as protracted armed violence, or the hostilities do not achieve the required minimum intensity or the parties are not organized, the non-international armed conflict threshold is not met and the events remain exclusively matters for the criminal law with the result that domestic and human rights law will limit the action that governmental agencies can take in response. The intensity requirement will only be satisfied if hostilities reach what is a reasonably high level of intensity.[25] A participating armed group will be regarded as 'organised' if it has an established command structure and the capacity to undertake sustained military operations.[26] Given what appears to be the somewhat loose nature of the association between the supporters of Al Qaeda, one might speculate that it would fail the 'organized' criterion.

On any analysis, the 9/11 attacks were large scale. 2,975 persons were killed during the four incidents.[27] To take mid-air control of a civil airliner in peacetime

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[23] Cronin 2011, p. 135. Audrey Cronin, having acknowledged that the threat of terrorism pales in comparison to the spectre of major conventional war, sees change in motivation, method, mobilization, morphology and mindset as placing the changing character of global terrorism at the centre of the changing character of war; Cronin 2011, pp. 145–146.

[24] See *Tadić*, Decision on the Defence Motion for Interlocutory Appeal, para 70 and Tallinn Manual, Rule 23 which stipulates that the hostilities must achieve a minimum level of intensity and the parties involved must show a minimum degree of organization.

[25] See the factors listed in Tallinn Manual, commentary accompanying Rule 23, para 7.

[26] Tallinn Manual, commentary accompanying Rule 23, para 11 citing, inter alia, the Limaj Judgment, paras 94–134.

[27] CBS News Report 2009, 9/11 Death Toll Climbs By One, dated 10 September 2009, available at www.cbsnews.com/2100-201_162-4250100.html.

and to cause it to collide with a structure on the ground killing all on-board and causing large numbers of casualties on the ground breaches numerous provisions of the criminal law, ranging from hijacking to hostage-taking to mass murder. To undertake the same kind of activity as a hostile act in connection with an armed conflict constitutes the war crimes, inter alia, of hostage-taking and of making civilians and civilian objects the object of attack.[28]

Turning to the action taken in response to 9/11, much has been written about the legal status of the so-called Global War on Terror now described by the Obama Administration as an armed conflict against Al Qaeda, the Taleban and associated forces.[29] Commentators have debated the classification of the conflict within the legal spectrum that we discussed in Chap. 2. However, a state that has been subjected to a large-scale attack by a loosely connected selection of individuals cannot be required by international law to stand idly by and do nothing to protect its citizens against the implicit threat of a repetition. Debate about the particular meaning to be given to the notion of armed attack as reflected in Article 51 of the UN Charter seems to miss the point that states have the inherent right to defend themselves and an inherent obligation to provide for the security of their citizens. Indeed, the UN Security Council Resolution adopted shortly after the 9/11 attacks seemed to recognize that this was so.[30]

If the current legal regime had no difficulty endorsing the right of the US to take appropriate action in response to 9/11, it has had great difficulty in addressing satisfactorily the transnational element of the threat and of the associated conflict(s). What, for example, is the legal position when US forces detect an Al Qaeda terrorist in a third state in which hitherto no armed hostilities have been taking place? The international law answer is simple. The sovereign rights of the third state must be respected.[31] Armed forces personnel of one state may only enter the territory of another state with the permission of the government of that state and, even if allowed to enter that territory, may only use force with the specific permission of the third state and strictly in accordance with any conditions imposed by the third state.[32] The military aircraft, including remotely piloted aircraft of the armed forces,[33]

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[28] See, e.g., Rome Statute, Articles 8(2)(c)(i), 8(2)(c)(iii) and 8(2)(e)(i). While the Pentagon would undoubtedly be classed as a military objective for the purposes of API, Article 52(2) and customary law, taking control of a civil airliner would constitute the crime of hijacking and any such attack would be subject to the rules of distinction, discrimination and proportionality.

[29] Speech by Koh 2010, available at www.state.gov/s/l/releases/remarks/139119.htm and Brennan 2012, available at www.lawfareblog.com/2012/04/brennanspeech/.

[30] UN Security Council Resolution 1368/2001, adopted following and in relation to the 9/11 attacks, recognized the inherent right of individual and collective self-defence and characterized acts such as the 9/11 attacks, and international terrorism, as a threat to international peace and security.

[31] The doctrine of 'hot pursuit' applies only to maritime operations; US Commanders' Handbook on the Law of Naval Operations, NWP 1-14, para 3.11.2.2.1.

[32] Tallinn Manual, Commentary accompanying Rule 1, para 4, UN Charter, Article 2(4), ILC Articles on State Responsibility, Article 20.

[33] AMW Manual 2009, Commentary accompanying Rule 1(x), para 6.

of a state may only enter another state's territorial airspace with the explicit permission of that state's authorities[34] and the third state may take appropriate action against any military aircraft entering without permission.[35]

Not all diplomatic arrangements between states are made public. It is conceivable that consent, for example to the operation by foreign forces and agencies of remotely piloted platforms in the airspace of a state where no armed conflict is under way, has been given by the national authorities of that state but that, in public pronouncements, the state's authorities deny having given such consent or conceal the fact. If the remotely piloted attacks undertaken by the foreign force or agency are within the terms of consent given by the relevant government, the applicable law will consist of the domestic and human rights law applying in the territory where the attacks occur and the domestic and/or military law applying to the personnel undertaking the attacks. If the operators of the remotely piloted platforms perform their duties from outside the state where an attack is to occur, the application of that state's domestic law is likely to be a theoretical rather than a practical possibility. If the personnel undertaking the attacks commit no breaches of their military or agency disciplinary code, it is hard to see what disciplinary action would lie against them. The critical questions whether the territorial state gave consent and whether the action taken was within the terms of that consent might well remain secret, because of the obvious political sensitivities involved.

6.3 Particular Approaches to Warfare and Their Implications

In Chap. 5 we considered the legal issues that are raised by the use, or potential use, of specific means and methods of warfare, namely remotely controlled and autonomous attack platforms, cyber warfare, warfare in outer space and nanotechnology. In this section, we shall look at some more general themes in the development of warfare and will ask whether these have implications from legal and broader perspectives. The first theme, that is exemplified by cyber warfare, by the use of remotely controlled platforms and by warfare in outer space, is the notion of remote attack. We will consider whether this aspect of the conduct of hostilities is something new, if not whether the aspects of remoteness introduced by these three methods of warfare are qualitatively different to what went before and, if so, whether these differences have legal and/or policy implications. Second, we will consider the effects-based approach to warfare and will assess whether such operations should challenge the established principles of the law of armed

[34] Chicago Convention 1944, Articles 1, 2 and 3(b) and (c).

[35] Consider Chicago Convention 1944, Article 3bis and note the reference to action in accordance with the UN Charter which would appear to recognize the right of a state to take appropriate action in exercise of its inherent right to self-defence as reflected in Article 51.

conflict. Third, we will reflect on the developing tendency to depersonalize warfare and ask whether this has legal, ethical and/or philosophical implications. Fourth, we examine asymmetric warfare, asking whether the tactics adopted by asymmetrically inferior parties are necessarily unlawful and considering appropriate responses by the asymmetrically superior party. In the final, fifth, element we look at conflicts associated with organized, high intensity crime asking whether these should be capable of amounting to armed conflicts.

6.3.1 Remote Attack

Remoteness, in the context of the present discussion, refers to the distance in space and/or time between the operator of a platform that is being used to undertake an attack and the location where the effects of the attack are felt.[36] Attacks that employ cyber methods, remotely piloted aircraft, autonomous attack methods or that use weapons in outer space are likely to involve a high degree of such remoteness. The cyber attacker may be a considerable distance, and thus remote, from the computer that is the target of the attack and may be even more remote from the persons or objects that are affected by the cyber attack. Similarly, the operator of a remotely piloted aircraft may perform his duties thousands of miles from the platform, and thus from the target. The ground controllers of an outer space weapon may be remote from the weapon[37] but will almost certainly be remote from the object of attack.

International law does not cite such remoteness as the basis either for prohibiting attacks or for restricting the circumstances when they would be lawful. Rather, the issue from an international law perspective is whether this remoteness affects the ability of planners and decision makers to undertake required precautions and to comply with core targeting law principles and rules, such as the principle of distinction and the rules as to discrimination. The use of all available sensors, the careful processing and consideration of all available information, the evaluation of the computer linkages and dependencies relevant to a planned cyber attack, these and other targeting processes aim to ensure that those who decide upon attacks are as well informed as possible so that attacks in armed conflict comply with the legal rules.[38]

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[36] Consider for example the American attack on Syrian and Lebanese irregular positions near Beirut in December 1983, discussed in Reisman 1994, p. 128.

[37] A weapon that is located on the earth's surface but that is designed to have effects in outer space may not, therefore, be remote from the operator, but the effects generated by the weapon will be.

[38] The targeting rules are, for states party to API, to be found in Articles 48–67 inclusive. For the obligation to develop capabilities to obtain and process information to support targeting decisions, consider Trapp 2013, pp. 158–159 and for the impressive efforts made by the United States to gather and utilize such information, see Trapp 2013, pp. 159–160.

While extensive effort is devoted to collecting as much information as possible, frequently the challenge lies in processing and analyzing the information so that it can be used effectively to inform decision making.[39] Technology makes it possible for remote attack in most forms[40] to be undertaken in compliance with the targeting rules and, as we saw in Chap. 5, it is whether a method of warfare is capable of being used in a discriminating way that is the critical weapons law issue in relation to such technologies.[41]

To illustrate the point, the modern battlefield, as Mike Schmitt has pointed out, is rendered "phenomenally transparent to those fielding ISR assets." In support of that contention, he draws attention to the information drawn from imagery intelligence, human intelligence, signals intelligence, measurement and signature intelligence, open-source intelligence, technical intelligence and counter-intelligence. However, as he observes, technology is fallible.[42] Indeed, one might speculate whether the development of cyber capabilities, and the potential these have for enabling the asymmetrically inferior to hack into and interfere with ISR and other targeting systems, may cause the modern battlefield to become less transparent.[43]

Indeed, errors can occur in practice when remote attack methods are used. The Guardian newspaper posed the question on 29 November 2011 "[w]hy did NATO forces kill two dozen Pakistani soldiers at a border post in the Mohmand region, some 300 yards across the frontier from Afghanistan early on Saturday morning?"[44] and thereafter commented "[t]here is a very simple explanation of what happened, the US military makes deadly mistakes all the time, and for all its technological wizardry and tremendous firepower, it has very little intelligence on the ground". In 2010, an American military investigation apparently "harshly criticized a Nevada-based Air Force drone crew and American ground commanders

[39] See Trapp 2013, pp. 160–162 where the challenge of analyzing in a timely way the vast amounts of raw data that are collected is discussed and where the US efforts to overcome that challenge are related. Note also the importance of effective distribution of the resulting intelligence. Kimberley Trapp considers the diligent development of capabilities and evaluates the US approach to identifying technical difficulties and seeking to put them right, for example through the 'lessons learned' process; Trapp 2013, p. 163.

[40] As we saw in Chap. 4, there are targeting law issues associated with autonomous attack that have yet to be resolved.

[41] For a discussion of the application of the law of armed conflict to cyber operations, see Dunlap 2011, pp. 81–99.

[42] Schmitt 2006, p. 17 where, as an example of this fallibility, reference is made to the 50 unsuccessful decapitation strikes against Iraqi leaders undertaken by US forces in 2003; Human Rights Watch 2003, Off Target: The Conduct of the War and Civilian Casualties in Iraq, December 2003, pp. 24–26.

[43] Consider the UK Ministry of Defence, DCDC, Future Land Operating Concept, JCN 2/12 dated May 2012 at para 230 where UK national dependence on cyberspace is noted and considered.

[44] Chatterjee 2011, available at www.guardian.co.uk/commentisfree/2011/nov/29/nato-free-range-to-kill.

in Afghanistan for misidentifying civilians as insurgents during a U.S. Army Special Forces operation in Oruzgan province in February, resulting in the deaths of as many as 23 civilians".[45]

There is a respectable argument that, irrespective of the strict legal position, errors in remote attack operations are morally unacceptable. The argument is that the fact that the attacking party exposes himself to no risk suggests that absolute care and the most extensive of precautions must be taken in order to be absolutely sure that the right target is being engaged and that civilian casualties and damage are avoided. Certainly, if errors do occur during remote attack operations, one might legitimately wonder what the legal consequences would be for those who planned, decided upon and executed the relevant attacks and indeed what other legal consequences should follow.

6.3.2 Liability for Error in Remote Attack

So who is responsible when something goes wrong and on what basis? Personal legal liability of those involved in remote attack operations can only sensibly be discussed by reference to the particular kinds of remote attack. Taking cyber attacks first, it may be difficult to establish which individual decided upon or executed a cyber attack. Indeed the likelihood is that numerous individuals were involved in creating the cyber weapon, in adapting or preparing it for use on the relevant occasion and in undertaking the actual cyber attack. Determining which act undertaken by which of those individuals caused the erroneous attack may be difficult.

In space warfare also, erroneous attacks may take the form either of engagement of the wrong target or of an attack that fails the discrimination rule. An erroneous space attack may be caused by technical malfunction, human error, incomplete or wrong information as to the targeted space object, incomplete information as to other space objects, or as to persons or things on the ground that are liable to be affected by the space attack or other factors; and attacks using remotely piloted aircraft may go wrong for essentially similar reasons.

It may be hard to locate the computer used to initiate a cyber attack, to determine who was using the computer at the relevant time and to determine whether that individual was acting on his own behalf or was operating on behalf of a state, group or other entity; of course if the cyber attack occurs during and in the context of an ongoing conventional armed conflict, the circumstances might make

[45] For reference to the earlier cited incident, see Zucchino 2010, available at http://articles.latimes.com/2010/may/29/world/la-fg-afghan-drone-20100531. Views differ as to the extent of the collateral casualties caused by 'drone strikes'; Shane 2011, available at: www.nytimes.com/2011/08/12/world/asia/12drones.html?hp.

these matters self-evident. Linking an attack to an armed force or to an agency of a state may be somewhat easier, for example, because fragments left by the weapon may indicate ownership of the weapon used.[46]

In any of these cases, assessing personal liability involves identifying an individual whose blameworthy act is causally linked to the erroneous attack. The attack decision may, however, be based on data the incorrect nature of which could not with reasonable diligence have been detected by the relevant decision maker. Error in attack does not, contrary to popular culture, presuppose individual fault or, therefore, liability.

Any consideration of legal responsibility must be by reference to the information from all sources that was reasonably available to the decision maker at the relevant time.[47] So in the case of an attack using a remotely piloted vehicle, it is the information that is presented to the operator when he decides to initiate the attack that is determinative. In the case of a cyber attack or an outer space attack, it is the information that is available to the person who triggers the attack that matters. The important question is whether the attack decision was reasonable in the circumstances as they were presented to the decision maker. In assessing the answer to that question, a number of matters will need to be reviewed, including whether other practicable precautions that would have verified the status of the target were not taken, whether it was to be expected that the attack would breach the proportionality rule and whether precautions were taken to minimize civilian injury and damage.[48]

An erroneous attack may, however, occur due to enemy action. The enemy might employ ruses, perfidy, voluntary or involuntary human shielding or other interference operations to impede attacks. This will be relevant when responsibility for the resulting attack is considered; it is, however, by no means certain that actual enemy interference can be identified or proved either at the time of the attack, shortly thereafter or indeed at all. While it may be unreasonable to blame the operator, say, of a remotely piloted aircraft for an erroneous attack caused by enemy interference, failure to detect that interference may cause that operator to be apparently to blame.

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[46] Consider however the issues, discussed in Chap. 4, that can arise when by means of a cyber operation one state interferes with the operation of an unmanned platform being operated by its enemy.

[47] See statement (c) made by the UK on ratification of API on 28 January 1998.

[48] As the UK Manual notes, API does not specify the level at which legal responsibility to take precautions in attack rests. Whether a person has this responsibility will depend on whether he has any discretion as to the way in which the attack is carried out. It follows from this that responsibility may, depending on the particular circumstances, be at any level from the Commander in Chief and his planning staffs to that of the individual soldier opening fire on his own initiative; those carrying out orders for an attack must cancel or suspend it if the object to be attacked will be such that the proportionality rule will be breached; UK Manual, para 5.32.9.

There is no war crime of failing to take precautions in attack.[49] With intent and knowledge making civilians the object of attack,[50] making civilian objects the object of attack[51] and undertaking attacks which clearly breach the proportionality rule when assessed against the anticipated overall military advantage from the operation as a whole[52] are, however, war crimes under the Rome Statute.[53]

There is no liability under the law of armed conflict for acts that cause death, injury, damage or destruction to the enemy and that comply with that body of law[54]; so death, injury or damage lawfully caused to enemy combatants does not form the basis of a law of armed conflict claim for compensation. This is also the case where death, injury or damage, that is expected to be caused to civilians or

[49] This is a reference to the precautions stipulated in Article 57 of API and to the corresponding precautions required by customary law.

[50] Rome Statute of the International Criminal Court, 1998 (hereinafter 'Rome Statute'), Article 8(2)(b)(i) renders 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' in the stated circumstances a war crime.

[51] Rome Statute, Article 8(2)(b)(ii) renders "intentionally directing attacks against civilian objects, that is, objects that are not military objectives" in the stated circumstances a war crime.

[52] Rome Statute, Article 8(2)(b)(iv) renders "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or wide-spread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in the stated circumstances a war crime. For a discussion of the notion of 'definite military advantage' as it applies to the definition of military objective in Article 52(2) of API, see Dinstein 2010, pp. 92–95.

[53] These offences are committed if the accused person acts with intent and knowledge, a state of mind to be distinguished from failure, without more, to take the required precautions. Command responsibility would be assessed in the same way as for operations using piloted aircraft, i.e. a military commander is responsible for crimes committed by forces under his or her effective command and control as a result of his or her failure to exercise control properly over such forces. It must be shown either that the military commander knew or should have known that the forces were committing or about to commit such crimes and that he or she failed to take "all necessary and reasonable measures within his or her power to repress or prevent their commission"; Rome Statute 1998, Article 28(a). Note the responsibility provision in Article 28(b) in relation to superior/subordinate arrangements other than military command.

[54] The lawfulness of the action precludes liability of the State that undertook the attack in question; Hague Convention IV, Article 3, requires that there has been a violation. As to liability of individual combatants, Article 43(2) of API provides that members of the armed forces are combatants, that is they have the right to participate directly in hostilities, and thus have immunity in relation to their acts in connection with the hostilities that are in conformity with the law of armed conflict.

civilian objects, is not excessive in relation to the concrete and direct military advantage that was anticipated, or where death, injury or damage is caused to civilians or to civilian objects by virtue of an erroneous attack attributable to the malfunction of military equipment.[55]

Article 3 of Hague Convention IV, 1907[56] and Article 91 of the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API 1977)[57] both link liability to the idea of a violation of the rules of the relevant treaty in a case which demands the payment of compensation.[58] The API Commentary notes that compensation will only be appropriate if restitution in kind or the restoration of the pre-existing position are not possible.[59] Moreover, Frits Kalshoven criticizes Article 3, and by extension Article 91, on the basis that it "bluntly states principle and rule, but does not specify whether 'acts' will encompass omissions, and entirely leaves open who may invoke a state's responsibility for a violation of applicable rules, and when, where and how".[60] In the context of the current discussion, important factors in determining whether such liability lies would therefore seem to be whether precautions mandated by law were not taken,[61] whether that caused the claimants to suffer loss which would

[55] See, for example, Kalshoven 2007, p. 212: "I am not convinced that collateral damage should be added to the agenda of promotion of individual rights to compensation for violation of the law of armed conflict."

[56] The Article states: "A belligerent party which violates the provisions of the said Regulations shall, if the case so demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces".

[57] This Article and Article 3 of Hague Convention IV, 1907, are expressed in similar terms except that Article 91 is concerned with breaches of any of the 1949 Conventions and of the Protocol (including the targeting rules in Articles 48–67 of API). See also para 3646 of the *API Commentary* and para 4 of the ILC *Commentary* to Article 7 of the Draft Articles on State Responsibility, 2001.

[58] See also the reference in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 38, to the duty to provide reparation.

[59] See generally Sandoz et al. 1987, paras 3652–3659.

[60] Kalshoven 2007, p. 207.

[61] Note for example the decision of the Eritrea Ethiopia Claims Commission, partly based on adverse inferences, reinforcing the conclusion that not all feasible precautions were taken by Eritrea in its conduct of air strikes on Mekele on 5 June 1998 and finding Eritrea liable for the resulting deaths and injuries to civilians and damage to civilian objects, reflected in Eritrea-Ethiopia Claims Commission, Partial Award Decision, *Central Front, Ethiopia's Claim 2,* 28 April 2004, para 112, available at www.pca-cpa.org/showpage.asp?pag_id=1151.

justify the award of compensation[62] and whether the circumstances of the case are such as to demand the award of compensation.[63]

Malfunctioning equipment, faulty software, defective manufacture of components, a mistake during the loading of data or inaccurate understanding of the target and its characteristics are among the many factors that may cause an attack to have unacceptable consequences for civilians and/or civilian objects; it may be hard to determine which factor or factors constituted the operative cause. Personnel involved in preparing the attack may have acted negligently; military personnel who are shown to have been negligent may have committed a breach of their disciplinary code, while civilians will be subject to whatever disciplinary arrangements are set forth in their contract of employment. If the unsatisfactory attack is caused by a mistake, an error of judgment or by careless manufacture, it would seem unlikely to amount to a violation requiring compensation under

[62] "Compensation can only be awarded in respect of damages having a sufficient causal connection with conduct violating international law…. The degree of connection may vary depending upon the nature of the claim and other circumstances"; Eritrea-Ethiopia Claims Commission, *Decision Number 7,* para 7, available at www.pca-cpa.org/showpage.asp?pag_id=1151. Later in the same decision, the Commission determined that the necessary connection is best characterized as 'proximate cause' and that in deciding whether that test is met the Commission would consider whether the relevant event should have been reasonably foreseen by an actor committing the international delict in question; Eritrea-Ethiopia Claims Commission, para 13. It would be for an adjudicating court, tribunal or commission to determine, in the light of its remit, whether a similar approach should be adopted in determining whether a sufficient causal relationship exists between a failure to take precautions and ensuing injury, damage or loss to establish liability. Dieter Fleck argues that the term 'compensation' cannot exclude the application of all forms of reparation (including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition) to violations of international humanitarian law; Fleck 2007, p. 184. For a discussion of claims commissions, see Kalshoven and Zegveld 2011, pp. 262–266.

[63] Frits Kalshoven addresses the question of settlement of individual claims, noting that the US armed forces regularly open a counter for this purpose and comments that this seems to be what the initiators of Article 3 had in mind. He also notes that claims may be possible before the courts of the ex-enemy state, although there are liable to be a number of obstacles; Kalshoven 2007, pp. 212–213. Those obstacles may include the doctrine of sovereign immunity and a domestic law statute of limitations. Paula Gaeta reports the traditional understanding that Article 3 of Hague IV and Article 91 of API involve responsibility of the liable state to provide reparation and therefore compensation only to the state of nationality of the affected individual and not to the individuals who have suffered the damage. She comments that this is an anachronistic view that can no longer be maintained. She notes that by virtue of the ILC's Articles on State Responsibility, violations of obligations *erga omnes* confer rights on individuals and both the injured and non-injured states can demand that the responsible state fulfils its obligation to make reparation to injured individuals; Gaeta 2011, pp. 308 and 326–327. Note also that a Resolution of the UN Human Rights Commission interpreted both Articles 3 and 91 as giving the right to a remedy to individual victims of violations of international humanitarian law; Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, CHR Res 2005/35, U N Doc. E/CN.4/2005/L.10/Add. 11 dated 19 April 2005.

Article 91 of API.[64] Specifically, it would, in the absence of unusual circumstances, seem difficult to characterize the negligent manufacture of weaponry as a violation of the law of armed conflict, and even if it could be so characterized, it is unlikely that the circumstances would demand the payment of compensation under Article 91.

Indeed, Dieter Fleck comments that "there are notorious difficulties for individual victims to obtain redress". Noting that claims settlement "for wrongful acts committed in wartime is widely excluded by an inability of states and societies to restore economic welfare and security, and efforts to bring redress to victims remain subject to controversial interpretations of international responsibility and its practical effects", he depressingly concludes "[i]n almost every case full settlement of atrocities committed in armed conflicts or internal disturbances is quite impossible".[65] Dieter Fleck observes that state practice and jurisprudence have, as yet, declined to afford international law rights to individuals corresponding to the duties of states to comply with international humanitarian law. He sees even general regulation of this complex area as 'less than realistic'.[66] Perhaps this is a field of law to which, in the future, the litigating zeal of attorneys might profitably be directed.

The discussion in this section has focused on the liability of individuals and, to a degree, that of States. The development of complex autonomous attack technologies[67] will, however, cause some to debate the potential liability of machines. After all, if it was a machine that made the attack decisions why should the machine not be held accountable for its actions? Darren Stewart objects that imputing moral agency to non-humans offends both the notion of the rule of law and the more visceral human desire to find an individual accountable.[68] There would seem, however, to be an even more basic objection. For the foreseeable future, and perhaps for a significant period beyond it, the relevant fault will indeed be human. The machine will have done what it was designed to do. It will have learned what it was designed to learn. It will have included in its calculations what it was told to include, and will have reacted to the results of those calculations in the manner it was designed to react. The personnel who procured the autonomous system will have received manufacturers' data and will have had the opportunity

[64] Compensatory payment may, however, be made on an ex gratia basis, such as reportedly occurred following the attack of the Chinese Embassy in Belgrade by US aircraft operating with NATO on 7 May 1999; see Kerry Dumbaugh, 'Chinese Embassy Bombing in Belgrade: Compensation Issues' available at http://congressionalresearch.com/RS20547/document.php. See Gillespie and West 2010, pp. 1–32, available at www.dodccrp.org/files/IC2J_v4n2_02_Gillespie.pdf, citing Myers 2007, pp. 76–96, for the view that the responsibility of designers is discharged "once the UAS has been certified by the relevant national air authority"; Gillespie and West 2010, p. 7.

[65] Fleck 2007, p. 174.

[66] Fleck 2007, p. 193.

[67] For the meaning of 'complex autonomy' for the purposes of this book, see Chap. 4.

[68] Stewart 2011, p. 291.

to test the system's performance before deploying it. The commanders and the planners will have information as to the machine's modus operandi and data as to its performance in past operations available to them when deciding to undertake the sortie, so it seems clear to the author that most untoward events arising from the use of such technologies will be attributable to, and ought to be capable of being attributed to, human factors. Whether there is sufficient evidence available to determine which exact human factors are to blame for a particular incident may prove problematic, but that is a discrete issue[69] which should not obscure this more fundamental point.

6.3.3 Wider Implications of Remote Attack

It is one thing to assess whether forms of remote attack are consistent with applicable international law, but quite another to determine whether attacking from such a considerable distance, whether in space or time, is ethically and morally acceptable. Judging ethical and moral acceptability of acts in warfare is, however, a highly personal, rather subjective activity.[70] It is perhaps relevant to consider that attacking from a distance is nothing new, that from the earliest times of organized conflict man has tried to attack while himself remaining at such a distance that his personal risk is minimized. While development of such technologies by the ancient Greeks then aroused controversy, the trebuchet, cannon, crossbow and longbow, artillery, bombardment from the air and remotely piloted UAVs represent, in a sense, the technical refinement over centuries, indeed millennia, of ways in which offensive force can be applied to a foe at diminished risk to the attacker.[71] It is of course possible that our contemporary concerns about remote attack have their roots in the Homeric complaint that such tactics are not heroic.[72]

If the physical distance between the attacker and the scene of the attack does not represent a qualitative step change from the evolution of 'warfare at a distance' that we have discussed,[73] is the moral concern not linked specifically to the distance factor as such but, rather, to the apparent depersonalization of the attacking

[69] Consider Wagner 2012, pp. 40–43 and see Sparrow 2009, p. 70.

[70] Consider, for example, the discussion of the moral and ethical issues posed by the use of unmanned systems at Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems, UK Ministry of Defence, 30 March 2011, paras 516–521.

[71] Indeed, it could be argued that concepts of remoteness in this context are relative. Thus, the physical distance from the place where the kinetic force is to be applied that would have been described as 'remote' by the ancient Greeks is of course markedly less than the possible distance between the operator of a remotely piloted aircraft and the place where it delivers an attack.

[72] Idomeneus, referring to the bow, complained "my way is not to fight my battles standing far away from my enemies"; Homer, Illiad, 13.262-3, and use of the bow was not consistent with the confrontational image that was the essence of heroic warfare; O'Connell 1989, p. 48.

[73] Consider Strawser 2010, p. 343.

process that modern technology seems to foster? The operator of the remotely piloted aircraft is affecting the fight without being part of it. The cyber attacker may be having effects in the theatre of operations while remaining outside of it, and while suffering no personal danger consequent upon the undertaking of the attack. The operator of a space-based weapon may, depending on the nature of the weapon, be having either direct or indirect effects on the Earth's surface without being at any risk himself.

This notion of 'invulnerable remoteness' is enhanced in the case of cyber warfare by the current likely difficulty in determining in a timely way which computer was used to undertake a cyber attack and which individual devised or adapted the cyber weapon and/or sent it on its way. In the case of a remotely piloted attack, the notion is enhanced by the difficulty confronting a victim of such an attack in determining, again in a timely way, who chose the target and/or prosecuted the attack on it. In the case of space to ground and space to space attacks that have injurious or damaging effects on the ground, similar considerations apply. There is something unattractive in the eyes of many about the idea that one side is invulnerable in a practical sense while the adversary must suffer the injurious and/or damaging consequences of the attack.

This difficulty that a victim, or a victim state, may have in determining which computer was used to initiate the cyber operation, who used that computer to do so, whether that individual was acting on his or her own account or on behalf of, say, a state or group and, if so acting, whether the relationship between the individual and that state or group was such as to attract international responsibility for the operation seems to the author to be of critical importance.[74] As the Articles on State Responsibility make clear, "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".[75] Similarly, actions of organs of the state, such as members of its armed forces, intelligence or internal security services,[76] and of individuals or entities empowered by the domestic law of the state

[74] In this connection, consider the publication on 19 February 2013 of the Mandiant Report as to the activities of APT1, believed to be the 2nd Bureau of the Chinese People's Liberation Army General Staff Department's Third Department, alleging: that APT1 has systematically stolen hundreds of terabytes of data from at least 141 organizations; that it focuses on compromising organizations across a range of industries in a selection of English-speaking countries; that there was an observed tendency for APT1 to use IP addresses in Shanghai; that there appear to be dozens if not hundreds of human operators; and Mandiant released 3,000 indicators to bolster defences against APT1 activities; the report is available at http://intelreport.mandiant.com.

[75] Articles on State Responsibility, Article 8. For a discussion of the 'effective control' test articulated by the International Court of Justice, and of the 'overall control' test applied by the International Criminal Tribunal for the Former Yugoslavia, as means of determining whether a State has responsibility for the internationally wrongful acts of non-State actors, see the discussion in Tallinn Manual, Commentary accompanying Rule 6, para 10.

[76] Articles on State Responsibility, Article 4(1).

to exercise governmental authority[77] are attributable to that state and thus attract state responsibility. If there was no instruction, direction or control of the relevant wrongful act by the state, or if it was not subsequently acknowledged and adopted by the state, the act of a private citizen or of a non-state actor cannot be attributed to the state.[78]

These rules only, however, apply in relation to internationally wrongful acts which include violations of the United Nations Charter, such as its Article 2 prohibition on the resort to the use of force between states, and violations of law of armed conflict obligations, for example the prohibition of cyber attacks against civilian objects.[79] Espionage is not regarded for these purposes as an internationally wrongful act for the obvious reason that it does not breach international law.[80] The Tallinn Manual on the International Law Applicable to Cyber Warfare 2013 observes that "a State's responsibility for an act of cyber espionage conducted by an organ of the State in cyberspace is not to be engaged as a matter of international law unless particular aspects of the espionage violate specific international legal prohibitions".[81]

There will be those who answer the moral aspect of these issues by suggesting that just war theory can provide a way forward, in which remote attack in pursuit of a right cause is acceptable, perhaps because those fighting a just war ought not to be required to accept casualties when doing so. Such theories ignore, however, that the law of armed conflict applies similarly to all parties to an armed conflict. Moreover, recognizing that justice and right are rarely the monopoly of any one party to an armed conflict, one is thrown back to ask whether the modern forms of invulnerable remoteness represent such a break from the past as to raise ethical concerns demanding of international action.

As we noted in Chap. 5, the lawfulness of all new weapons must be determined by states according to criteria prescribed by current international law. Properly applied in good faith, these legal rules are adequate to address the legal concerns arising from remote attack technologies. However, as pointed out in the Conclusion to Chap. 5, the law needs to be agile in addressing new technologies, and autonomy in attack is one weapons-linked technology the evolution of which should be monitored closely by the international community, with a view to taking appropriate action if, as is by no means inevitable, emerging applications of the technology are seen to require such action on legal or ethical grounds.

Concerns of this sort were raised during the Kosovo conflict when air operations over Serbia, conducted at an altitude of 15,000 ft and thus beyond the range of air defence assets, precipitated discussion of the notion of 'zero casualty war'.

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[77] Articles on State Responsibility, Article 5 with associated Commentary.

[78] Tallinn Manual, Commentary accompanying Rule 6, paras 11 and 14.

[79] Tallinn Manual, Commentary accompanying Rule 6, para 3.

[80] See AMW Manual 2009, Rule 119: "Acts of espionage are not prohibited under the law of international armed conflict".

[81] Tallinn Manual, Commentary accompanying Rule 6, para 4.

This was, of course, a misnomer in that while the aviators may have suffered no casualties, those on the ground in the targeted areas were most certainly at risk.[82] At least those attacks involved the pilot of the attacking aircraft placing him- or herself over, or within the range of his weapon, of the target. The evolving methods of warfare we have discussed in this part of the chapter keep the attacker beyond the range of the weapon that he is using to prosecute the attack. The operator of the remotely piloted aircraft, for example, is located far further from the target than the range of the on-board missile firing system. A cyber attacker undertaking a remote cyber attack is similarly removed from the effect that his attack on the target computer system produces for the persons, objects or facilities that are the customers of that targeted computer. So also with space operations the attacker is likely to be entirely outside the range of the weapon he is using.

Those elements of distance and apparent invulnerability suggest that those involved in preparing and launching some kinds of remote attack lack the kind of relationship with the fight that the right to participate in it seems to presuppose. It is combatants who have that right, and they are members of the armed forces and participants in a levee en masse. The combatant privilege is that when they use violence in accordance with the law of international armed conflict on behalf of one of the parties to such a conflict, they are not liable to be prosecuted, convicted or punished for doing so and on capture have the right to prisoner of war status. The quid pro quo for these rights is that they can at any time be made the object of attack by adverse parties to the conflict. It is that delicate balance of rights and liabilities that may be disturbed by some of these modern methods of warfare. Although, as we shall see in Chap. 7, the scientists and technicians who deliver an autonomous attack using either a cyber weapon or an unmanned aerial vehicle are as a result likely to be regarded as directly participating in the hostilities, there is little or no practical likelihood of them being identified, still less attacked. The liability of anyone involved in such a remote attack operation to be targeted in response, whether as a combatant or as a civilian who has directly participated in the hostilities, is theoretical rather than practical. The essential question, considered in the remainder of this chapter, is whether this element of practical impunity calls into question the basis and relevance of the law of armed conflict.

However, if the armed forces of a state use a platform or equipment belonging to them to undertake an attack, that state will be responsible for the attack, whether it is remote or otherwise. Article 91 of API will determine whether there is a legal obligation to compensate, and the state will retain the discretion whether to make an *ex gratia* payment in circumstances where no legal liability can be, or has been, established.

[82] See World, Europe, Robinson Attacks NATO Air Campaign, BBC News 1999, 9 May, available at http://news.bbc.co.uk/1/hi/world/europe/339562.stm and see Rogers 2000.

6.3.4 *Effects-Based Attacks: Does Law Based on Distinction Make Sense?*

It has been suggested that prosecution of certain kinds of attack, that attacking certain types of target or that engaging in particular kinds of military operation may influence the enemy leadership, directly or by means of the response of the enemy population, to act in a predetermined manner.[83] As Mike Schmitt has succinctly put it, "in a coercion campaign, the defining question is what to strike to force the enemy leadership into making the decision you desire".[84] This attempt by using force in a particular way to deliver a stimulus calculated to generate a response that has been identified in advance is the 'effects based approach' that we shall assess in this section. This effect, alone or in association with other effects, is intended to persuade or compel the enemy to act or refrain from acting in a certain way. "Effects based targeting theorises that by attacking specific links, nodes, or objects the effect or combination of effects will achieve the desired objective",[85] but Montgomery recognizes the difficulty in demonstrating a cause and effect relationship between the chosen attack or operation and the wished-for ultimate outcome. Lieutenant General Michael Short, referring to the Kosovo Conflict, reportedly said:

> I felt that on the first night, the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so that the next morning the leading citizens of Belgrade would have got up and asked, 'Why are we doing this?' and asked Milosevic the same question.[86]

A party to an armed conflict may be encouraged to undertake an effects-based attack by the hope that it will bring an early and successful end to the conflict, in order to secure for itself a specific advantage it considers will accrue from the

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[83] For the impact of technological advance on effects-based operations see Schmitt 2003, pp. 60–63. Consider also Manyon and Rooney 1999. In operations that seek to compel the enemy to undertake or refrain from an activity "force must be applied surgically, striking at centres of gravity likely to alter the opponent's cost-benefit analysis without imposing costs so great as to render him either intransigent or irrational"; Schmitt 2003, pp. 64–65.

[84] Schmitt 2006, p. 37. For an example of what he describes as coercive reprisal action, consider the US April 1993 raid on Baghdad, discussed in Reisman 1994, pp. 123–125. Consider also the importance of the enemy's 'centre of gravity' in notions of 'Fourth Generation Warfare'; Haines 2012, pp. 18–20.

[85] Montgomery 2002, p. 190. See also Smith 2002 at www.iwar.org.uk/rma and AJP-3.9, Allied Joint Doctrine for Joint Targeting, May 2008, para 0119; as to targeting the morale or will of the population, see Meyer 2001, p. 8 and Dunlap 2000, p. 9. For a critique of Charlie Dunlap's proposed new understanding of the notion of 'military objective', see Rogers 2012, pp. 117–118. Tony Rogers must be right that that the concept of indirect but effective support for military action is difficult to reconcile with the definition of military objective in Article 52 of API and, as he points out, much will depend on exactly how indirect the support is.

[86] Whitney 1999. There have been suggestions that the enemy's economy might be lawfully attacked; Adler 1970, p. 36.

successful prosecution of the attack or because it believes that the enemy leadership will react to the attack by acting in a preferred manner that will benefit the attacking party. There can be no legal objection to effects-based attacks that comply with the law of armed conflict,[87] for example by having only military objectives as the object of attack[88] and by complying with all targeting law rules.[89] It should nevertheless be made clear at the outset of this discussion that seeking to achieve an early end to the armed conflict or seeking to influence the thinking of the opposing leadership in a particular way does not justify attacking civilians, civilian objects or other persons or objects protected by the law of armed conflict[90] and "the government as a whole, the organisations that assist to keep a government in power, and the personal assets of a government's elite are not lawful military objectives per se. Rather, they can become military objectives only when assessed to be of military value."[91]

But we should look more closely at the effects-based debate and examine whether recent developments in methods of warfare ought to cause us to revisit the clear legal position expressed in the previous paragraph. If Clausewitz was right that war is "an act of violence intended to compel our opponent to fulfill our

[87] This somewhat tautological assertion is, given the ensuing discussion, an important statement of the seemingly obvious.

[88] API, Article 52(1); Schmitt 2003, p. 73 and Solis 2010, p. 524; comments by US military officials reported in Bennett and Coll 1999 at www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/belgrade052599.htm; Report on Expert Meeting—Targeting Military Objectives, University Centre for International Humanitarian Law, Geneva, 12 May 2005, p. 11; Henderson 2009, pp. 64–65.

[89] See generally API, Articles 48–67. Note for example that media facilities do not constitute military objectives if they have no direct link to military operations, if attacking them offers no concrete military advantage and if the real purpose of the attack is to affect civilian morale; Report on Expert Meeting, n. 89, p. 11. Note also that an intended 'effect' will only fall to be considered in a proportionality assessment if it is military, concrete not speculative and if it is anticipated as a direct result of the attack; consider the attack in March 2003 on the al Mansur presidential yacht belonging to Saddam Hussein; Patch 2008, available at www.usni.org/magazines/proceedings/2008-09/taking-out-saddams-floating-pleasure-palace.

[90] Sassoli 2003, p. 3. For a criticism of the US extension of the definition of military objectives to include objects that effectively contribute to the enemy's war-sustaining capability and for a critique of the "discredited myth that miserable civilians will become less loyal to their own government and troops", see Shue 2011, pp. 467 and 472. As Henry Shue explains, once civilian morale becomes a military objective, much of the purpose of distinguishing military objectives from civilian objects has been defeated; Shue 2011, p. 472.

[91] Henderson 2009, p. 146. Charles Dunlap points out that "attacks for the sole purpose of eroding non-combatant life support systems are prohibited. This is not to say, however, that noncombatants cannot be inconvenienced or denied luxuries or, for that matter, have their political will be made a target. But doing so…is difficult under today's legal regime because defining the military advantage when the aim of the operation is to weaken the enemy so as to make him surrender is quite problematic'; Dunlap 2000, p. 12 citing in part Sandoz 1999. For a critique of Charlie Dunlap's approach, see e.g. Oeter 2006, p. 57 and for a brief critical comment on the employment of effects-based thinking in Operation Iraqi Freedom by means of a concept known as 'shock and awe', see Echevarria II 2011, p. 441.

will",[92] the question to consider is whether it is logical to judge the legality of military operations during armed conflict exclusively, or indeed partially, by reference to the degree to which force is directed against and limited to combatants, directly participating civilians or military objectives as each such concept is understood in the law of armed conflict. That is most assuredly what the law requires, but does it continue to make sense?

Reason would lead one to believe that activity in armed conflict is militarily useful to the extent that it will be effective in causing the enemy to comply with the will of the party undertaking it.[93] The authors of the 1868 St Petersburg Declaration[94] regarded "the only legitimate object which States should endeavor to accomplish during war" as being "to weaken the military forces of the enemy" and that "for this purpose it is sufficient to disable the greatest possible number of men".[95] A literal interpretation of these words is that weakening the opposing military forces is the singular objective of the war. Proponents of effects-based notions complain that the object of the war is to cause the adversary to comply with our will. So, at face value, the Clausewitz and St Petersburg views appear to conflict with one another. The international law notion of military necessity, the principle of distinction, the rule of discrimination, the principle of proportionality and the subsidiary rules of targeting including as to precautions all have their foundation in this St Petersburg proposition.

Some advocates of a development of the Clausewitzian approach complain that shortening the war by means of an effects-based attack will limit the number of casualties, both civilian and combatant. They would argue that the disagreement that caused the armed conflict should remain central to the hostilities that take place as a result. Describing the disablement of the greatest possible number of men as the means of weakening the military forces of the adversary, and thus of achieving the object of the war, risks maximizing total casualties, it might be argued, and thus may have the effect of perpetuating or at least lengthening the conflict.

Let us ask ourselves some relevant questions. Does the introduction of some novel methods of warfare have the effect of diminishing the differences between civilians and combatants? The answer would seem to be perhaps. Are civilians increasingly being placed in roles more closely connected with the conduct of

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[92] Rapaport 1982, p. 101.

[93] It seems that, during the American Civil War, the intent of Sherman and of Sheridan was not to target civilians of the opposing party but, rather, to initiate early overtures for peace by inflicting poverty and privation on them; Fenwick 1965, p. 681 and Bordwell 1908, p. 79. Note also Moore 1924, p. x; even in the Middle Ages, the producer of foodstuffs was off limits for targeting purposes.

[94] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes in Weight, St Petersburg, 11 December 1868 (St Petersburg Declaration).

[95] St Petersburg Declaration, preambular paras 2 and 3.

hostilities? The answer would seem to be yes.[96] Do certain parties to some modern armed conflicts deliberately use civilians to undertake attacks in which civilians and civilian objects seem to be the object of attack? Indeed so. Do some unscrupulous parties to modern armed conflicts place civilians as human shields in the vicinity of military objectives with the clear purpose of preventing attacks on such objectives by parties to the conflict that are seeking to comply with the law of armed conflict? That is the case.

So do these developments suggest that the foundations on which the principle of distinction rests are somewhat unsure, and is the basis for the traditional objection to effects-based attacks that breach the law of targeting still sustainable? In the author's view, the traditional and still correct answers to these questions are, respectively, no and yes. However, when the factors mentioned in the previous paragraph are considered alongside the emerging methods of warfare referred to in the previous section, perhaps the old conventional certainties are being shaken somewhat in the minds of some observers. In the remaining paragraphs of this section, therefore, we will reflect on some of the legal problems posed by effects-based operations in their purest form and will see how the distinction principle copes with the challenge.

Let us start by reminding ourselves of the core international law notion of military necessity, i.e. the principle "whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war".[97] The clarification of the notion in the Joint Service Manual of the Law of Armed Conflict (UK Manual) describes the legitimate purpose of an armed conflict as the complete or partial submission of the enemy at minimum cost to one's own party to the conflict.[98] So this vital notion sees the purpose of war as submission of the enemy, not achieving a particular effect, such as changing the minds of the opposing governmental hierarchy. Achieving the ultimate purpose can only lawfully be achieved through submission, total or partial. Perhaps, however, there is not too much of a difference here, because partial submission of the enemy might take the form of a change in the enemy's position on one particular issue. The point, however, is that such a change of enemy view in the course of an armed conflict must, indeed can only lawfully, be achieved by uses of force that comply with the law of armed conflict.

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[96] Consider for example how the development of automatic and autonomous attack technologies has the effect that the whole concept of 'persons who decide upon or execute attacks' becomes blurred, with new actors such as computer scientists, weapons technologists and those involved in the testing of such weapon systems becoming increasingly responsible for the attacks undertaken by the machines they develop and test; see e.g. Wagner 2012, p. 46.

[97] UK Manual, para 2.2 as amended, citing UK Joint Doctrine Publication 0-01.1, UK Glossary of Joint and Multinational Terms and Definitions (Edn. 7) at p. M.9 and AAP-6, NATO Glossary of terms and definitions (2008) at p. 2-M-6. The Manual explains that a state may use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment and with the minimum expenditure of life and resources; UK Manual, para 2.2 as amended.

[98] UK Manual, para 2.2 as amended.

Of central importance to this part of the discussion is the idea of lawful targets. These comprise combatants, civilians who directly participate in the hostilities and military objectives. In relation to the targeting of persons, either an individual is a combatant or directly participating civilian, and thus liable to be attacked, or he is not. The principle of distinction requires that peaceful, non-participating civilians must not be made the object of attack. To do so would breach fundamental principles of law binding on all states and all people[99]; to argue that such behaviour should be lawful would put at risk the foundation stone of the law of armed conflict. Remove that core principle and civilians, persons hors de combat and victims in general would be at risk of lawful attack.

The notion of military objective similarly has the effect of limiting the objects that may lawfully be targeted. To suggest that any object may be legitimately made the object of attack for effects-based reasons risks putting virtually every object, building, vehicle and place at risk of lawful attack and would thus soon lead to wars of total and wanton destruction and slaughter. Furthermore, as Adler commented, "devastation which brings the end of the war in the shortest time may in fact hinder attainment of reconciliation and the achievement of a lasting peace, presumably a goal of any war".[100]

So, the main objection to any effects-based approach that conflicts with established targeting law is that it places at enhanced risk persons and objects that, on current widely accepted legal interpretations, are victims or persons or objects that make no direct contribution to military action.[101] Moreover, insubstantial phenomena such as popular support for the regime, civilian morale and the willingness of the population to support the war cannot be military objectives as that term is understood at law,[102] and there is no clear and provable basis for predicting with adequate assurance how any such insubstantial phenomena will be affected by particular hostile acts.[103] While military objectives may indeed be tactical, operational or strategic, at whatever level they lie they must nevertheless satisfy the Article 52(2) definition.[104]

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[99] As to the status of the distinction principle as the bedrock of the law of armed conflict, see Dinstein 2006, p. 146.

[100] Adler 1970, p. 35.

[101] Consider for example Adler 1970, p. 41 and Solis 2010, p. 523.

[102] By this is meant that such phenomena are not objects to which Article 52(2) of API refers.

[103] Having acknowledged that the purpose of all military activity is to change the enemy's mind, it should be recalled that the insubstantial phenomena referred to in the text "may be affected, not always as one would wish nor perhaps as one might have expected, by the manner in which hostilities are conducted'; Boothby 2012, p. 499. While eroding the will of the enemy to resist is the critically important aim, targeting civilians or civilian objects with the purpose of doing so is prohibited. As Hays Parks has properly emphasized, "Notwithstanding and perhaps consistent with the definition of military objective in Additional Protocol I, the objective of war remains destroying the enemy's will to resist – not merely a nation's military capability, but a nation's will. So long as this is done through attack of military objectives, it is not prohibited. War is a coercive tool of international relations"; Hays Parks 2006, p. 97 and see Dunlap 2012, pp. 120–122.

[104] Hays Parks 2006, pp. 98–99 and see Dinstein 2010, p. 95.

6.3.5 *Taking People Out of Warfare*

In this section, the focus shifts somewhat from law to policy and ethics.[105] The question we pose is whether the use of cyber methods of warfare, of autonomous attack techniques and of some remotely controlled platforms in the future will cause the conduct of hostilities to cease to be armed conflict as we recognize it. Underlying that is the even more fundamental question whether such activity can be regarded as legitimate.

Computers have already been used to cause damage to a State's assets. The most obvious but by no means the only example is the 2010 Stuxnet attack on the Iranian nuclear centrifuges. Computer scientists continue to develop and refine methods of defending against such attacks. The Tallinn Manual speaks of passive and active cyber defence[106] in terms which make it clear that active cyber defence measures may involve launching preemptive or preventive cyber counter-operations against the source of the initiating attack. Missile defence systems are being developed by a number of nations. When active, the system detects an inbound missile and responds automatically by firing a munition to intercept the inbound missile.[107] As we saw in Chap. 4, autonomous attack technology is being developed for use on unmanned platforms. Technicians develop the software and install the target algorithms; once it is launched, the machine searches the preset area for the specified time period seeking targets that accord with the algorithmic data and when objects are located that so accord, the machine makes and then carries out the attack decision.

In the context of cyber warfare, cyber attacks in defence are likely to be automatic, pre-programmed cyber operations against intrusions from the outside, sometimes referred to as 'hack-backs'. Given that the initiating attack may have come from, or via, a multiplicity of computers which are not necessarily military in nature and which may not necessarily be operated by a party to the conflict, "states will have to carefully evaluate the lawfulness of such automatic hack-backs in light of the principle of precaution".[108]

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[105] For a discussion of the notion of ethical robots, see generally Arkin 2009, pp. 29–32, Wagner 2012, pp. 49–59, and Sparrow 2012 from p. 304.

[106] See Tallinn Manual, Glossary, where 'active cyber defence' is defined as "A proactive measure for detecting or obtaining information as to a cyber intrusion, cyber attack, or impending cyber operation, or for determining the origin of an operation that involves launching a preemptive, preventive or cyber counter-operation against the source." The Glossary defines 'Passive Cyber Defence' as "A measure for detecting and mitigating cyber intrusions and the effects of cyber attacks that does not involve launching a preventive, preemptive or countering operation against the source. Examples of passive cyber defence measures are firewalls, patches, anti-virus software, and digital forensics tools."

[107] See for example Israel stages test flight of Arrow 3 missile defence, Daily Telegraph, 25 February 2013, available at www.telegraph.co.uk/news/worldnews/middleeast/israel/9893150/Israel-stages-test-flight-of-Arrow-3-missile-defence.html.

[108] Droege 2012, p. 574 and for a discussion of the precautions principle as it applies to cyber warfare, see Droege 2012, pp. 575–576.

Some aspects of these technologies are already in service whereas others lie at or slightly beyond the horizon. Moreover, as we noted earlier in this chapter, wars will for the foreseeable future inevitably include more traditional, manned operations in which people will continue to be centrally involved in the use of force. However, it is now legitimate to ask whether the 'depersonalisation' of warfare implicit in the technical developments we are discussing raises ethical issues, if so what are they and do they matter?

At the ethical level, the question seems to be whether it is proper for machines to decide who is to live and who is to die, what is to be damaged and what is to be spared. There is a very real legal and ethical objection that a machine is not liable to the criminal and disciplinary sanctions confronting a combatant, an objection that would suggest to some that autonomous attack technology is fundamentally objectionable on this ground, and is liable to remain so for the indefinite future.[109]

In truth, people are always going to be most closely involved in determining these matters, even in the case of autonomous attacks. By designing the software that is used to perform the autonomous targeting decision making, by prescribing the area that the sensors must search and the time limitations of such a search on the occasion of a particular sortie, by setting the number of points of similarity that there must be for acceptable recognition to be deemed to have occurred, by reviewing the pattern of life data and by planning and then deciding whether to authorize the sortie human beings set close constraints on what the machine can do. Such a machine is and remains the tool of the human being who authorizes the mission and it is that aspect which is critical.

Similarly, if a machine is preset to react in a particular, hostile way if specified events occur, the nature and circumstances of this permitted response have been decided and then programmed by human beings and again the machine remains the tool of the individual who authorizes its deployment on such a mission. This may be the answer to the ethical issue for as long as the machine can properly be regarded as the tool that is employed by the human being. It is when technology so develops that the machine is no longer the tool and starts to become the master that ethical difficulties start to become insuperable. Different commentators are likely to define the technical point at which this transition occurs in differing terms.[110] That point of transition would, however, seem to arise when the machine starts to make its own decisions in favour of attack as opposed to making decisions declining to attack because of something the machine has observed or when it makes decisions the parameters of which have been carefully prescribed in advance by those that develop and employ the platform, instrument or cyber tool. For the avoidance of doubt, there would seem to be no ethical concerns if the 'self-initiated' decisions that the machine is making consist of application to itself of

[109] Consider, for example, Sparrow 2012, p. 66.

[110] Note for example Steven Haines' view that war is always a human, moral and social activity and that "a conflict 'fought' exclusively by machines against other machines could not constitute a Clausewitzian war". Haines believes it to be part of the nature of war that all those engaged in it must be capable of reaching moral judgments as to what they are doing; Haines 2012, p. 11.

additional constraints limiting its use of force, for example because of unexpected persons or objects detected in the vicinity of a target. Ethical difficulty seems to arise when the machine's application of artificial learning intelligence (see discussion in Chap. 4) has a permissive effect, in that it is the machine that is deciding to apply the use of force outside the permitted circumstances pre-programmed into its controlling software. Clearly, other observers will regard the critical factor as the making of a tactical attack decision, concluding that any platform or system that is designed to decide mechanically or automatically what to attack, when and perhaps how, raises ethical concerns.

On any view, certain uses of 'artificial learning intelligence'[111] in attack are morally and ethically unacceptable. The machine is making the relevant decisions and is adjusting the basis of doing so in the light of the lessons it has chosen, or been permitted by its designers, to learn.[112] One can perhaps imagine a kind of artificial learning intelligence the learning capability of which is limited to imposing increasing constraints on targeting decision making beyond the constraints imposed by autonomous attack technologies of the sort we have been discussing and in such a way as to improve compliance with the distinction principle, with the discrimination rule and with the precautions rules.

Imagine, for example, an unmanned aircraft equipped with autonomous attack facilities searching an area that has been defined by the person who plans the sortie. It looks for objects that comply with points of recognition prescribed by the planner, comparing what it observes in the area surrounding the target with the data fed into it by that individual, data that was informed by pattern of life observations made during the period leading up to the sortie. If artificial learning intelligence were to be applied to such a system, with the consequence that the system learns how to detect protected persons or objects such as civilians or civilian objects more reliably, this would seem to be an acceptable way of using artificial learning intelligence in autonomous attack. Much will, however, depend on the detail of a particular system. An artificial learning intelligence system that is so constructed that the machine is permitted to choose to loosen the constraints that reflect targeting law will of course be legally unacceptable. Between these relative extremes, it will be necessary to determine, by means of testing, exactly how the learning process is limited and whether the results of all possible learning outcomes will be such that the platform's decisions, and the precautions taken in reaching them, comply with targeting law rules.

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[111] The term 'artificial learning intelligence' is used here non-scientifically to denote artificial intelligence that develops the kind of understanding or appreciation that is necessary to support complex autonomy as that concept is employed in Chap. 4.

[112] Markus Wagner suggests that even in the context of such artificial learning intelligence, a human is potentially liable for adverse consequences of his negligent failure to control what the machine is permitted to learn; Wagner 2012, p. 42, text accompanying footnote 117.

The more fundamental, philosophical[113] questions to ask are whether there is some sort of 'participation fee' that must be paid in order to justify involvement in an armed conflict and whether that 'fee' is expressed in blood? Perhaps this is the thought that lies at the root of the unease we may feel about depersonalized warfare. Or perhaps we feel that people must remain centrally involved because only by being so can people instantly decide when the war should end. Or maybe we just feel that war is, and should remain, at core a human activity. After all, it will have been disputes among humans that initiated the war and the outcome of a war fought between machines may prove nothing other than which party to the conflict is the technically superior party, with the implicit objection that warfare is about identifying something different, though exactly what may be hard to define. There is the further objection that establishment of technological superiority could be achieved without any use of weapons or methods of warfare and without the infliction of any casualties or damage.

The lawyer would point out that resort to the use of force does not necessarily imply an obligation to pay any 'fee', whether expressed in blood or otherwise. At law, resort by a state to using armed force is only legitimate in exercise of the inherent right of individual or collective self-defence or as authorized by a resolution of the UN Security Council under Chapter VII of the UN Charter.[114] If a state is attacked by another state, is there any good ethical or philosophical reason why it should not use purely autonomous mechanical methods, alone or in combination with other methods, to counter the attack? Similarly, if there is a threat to the peace or breach of the peace caused by a state and the Security Council finds it necessary under Article 42 of the UN Charter to authorize the use by a state or states of 'all necessary means' to address such a situation, is there any good reason why those dealing with the matter should not use autonomous attack methods alone or in combination with other methods to prosecute an armed conflict that results from implementing the Chapter VII mandate? Put another way, what exactly is the ethical, moral or philosophical basis for saying that a state defending itself against unlawful attack or undertaking Security Council-mandated action to re-establish international peace and security must place its own personnel, civilian or military, at any risk at all in doing so?

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[113] The word 'philosophical' is used here colloquially. The philosophical underpinnings of international relations and international law are discussed in Doyle and Carlson 2012, p. 123. The conclusion is drawn that, of these renowned philosophers, "Locke … provides the firmest theoretical foundations for an international law open to all states that are willing to abide by it. Hobbes makes it clear that there are no states outside the zone of law, if we are prepared to include self-interested behavior as sufficient for lawful compliance. Locke adds a commitment to law for its own sake" and "includes both democratic and non-democratic states within the zone of law – to the extent they are prepared to respect life, liberty, and property. Locke overlooks the secure foundations of the Kantian Republican peace, but in doing so, devises an international rule of law resting on sovereign equality;" Doyle and Carlson 2012, p. 140.

[114] As contemporary events associated with the alleged use of chemical weapons in Syria in 2013 demonstrate, the suggested right of humanitarian intervention is at best controversial.

Perhaps the lawyer is wise to put the issue in those terms and to leave it to the moralists, ethicists and philosophers to debate the matter. The law of armed conflict does not of course prohibit a 'zero casualty' conflict in which one side seeks to fight without suffering casualties, provided that implementing the policy does not involve a failure to implement law of targeting rules, including the rules as to precautions in attack, with appropriate care. But a final question needs to be posed, namely is a conflict characterized by the use of autonomous machines by both sides in attack and defence a war, or armed conflict at all? To the lawyer, the answer is likely to be yes. The machines will be armed and dispatched by the armed forces of the states involved in the conflict and will be intended to cause casualties and damage to the personnel and property of the opposing party. Provided the violence and other criteria discussed in Chap. 2 are met, such activity is capable of constituting either an international or non-international armed conflict depending on the circumstances.

Leaving the strictly legal interpretation to one side, the broader question is whether a 'machine versus machine' clash of arms in which people remain peripheral is 'war as we know it' or, even, 'war as we are prepared to recognize it'. What, after all, is war all about when machine takes on machine and people are relegated to observer, and sufferer, status? Perhaps the answer is that armed conflict undertaken in such manner is what armed conflict always was, a contest between states or within a state in which the parties use the resources, technologies and personnel at their disposal in an effort to impose their wills on each other. Most observers are, however, likely to find the idea of autonomous warfare unsettling, and it seems clear that this is a topic on which international discussion needs to take place. It is a field in which the law we currently have should limit what can legitimately be brought to the battlespace, but the law may need revision if science starts to bring to the battlespace technologies that states and civil society in general find unacceptable.

6.4 Asymmetric Armed Conflict

Asymmetry is defined in the Concise Oxford Dictionary as "lack of symmetry" and symmetry is said to mean "the quality of being made up of exactly similar parts facing each other or around an axis" and "similarity or exact correspondence".[115] Dissimilarity therefore lies at the core of any notion of asymmetric warfare. It is warfare between the dissimilar and "[f]undamental inequalities in force, size, weapons, strategies, resources, legitimacy etc. are an attribute of virtually all new wars".[116] Metz and Johnson talk about deriving advantage by thinking differently from the opponent at the political-strategic and/or military-strategic levels and

[115] Concise Oxford English Dictionary 11th edition, 2006 revised, p. 1459. See also Green 2008, pp. 88–90.

[116] Thürer 2011, p. 246.

employing differing methods, technologies, values, organizations or time perspectives over the short- or long-term and alone or in combination with other approaches.[117]

As both interpretations suggest, the concept of asymmetric warfare is essentially broad as the dissimilarity between the parties may be based on any attribute that is liable to be determinative of the outcome either of the armed conflict as a whole, or of a particular phase or element of it. In common discourse, the term is used to refer to a situation in which one party to the armed conflict is blessed with a relative abundance of resources, with high tech weaponry, with well-trained and numerous armed forces and a solid financial and industrial base while the other party lacks some or all of these advantages. If that is the nature of asymmetry in warfare, it is the ways in which the asymmetrically inferior party goes about redressing this imbalance in advantage that potentially raises international law issues. It should be stressed at the outset that not all responses to asymmetric inferiority are of necessity unlawful. Equally, asymmetry does not excuse breaches of international law.[118]

It is a fundamental principle that the law of armed conflict applies to the contesting parties equally, irrespective of the rights and wrongs of the resort to force and irrespective of the strengths or weaknesses of the parties involved.[119] Accordingly, asymmetric inferiority cannot justify a resort to tactics and methods of warfare that are prohibited by the law. That said, as Michael Schmitt observes, "forces that are technologically disadvantaged have two basic problems – how to survive and how to effectively engage the enemy".[120] Specifically, making civilians or civilian objects the object of attack, whether by means of suicide attacks or otherwise, is prohibited.[121] There is, however, no rule of the law of armed conflict that prohibits suicide attacks per se. As with any attack, the focus of the law is, rather, on the requirement that the target be lawful and that the manner in which the attack is carried out be in accordance with applicable rules, for example as to precautions in attack.[122] So, if a suicide attack is undertaken as part of an armed conflict in which the attacker targets for example a military facility or members of the opposing armed forces and if such an attack complies with the discrimination rule and appropriate precautions are taken, the attack is in principle lawful. Moreover, if the attack is undertaken by rebels in the course of a non-international armed conflict or during peacetime, the use of violence will be in breach of applicable domestic criminal law and an unsuccessful attempt to

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[117] Metz and Johnson II 2001, available at www.au.af.mil/au/awc/awcgate/ssi/asymetry.pdf.

[118] For a discussion of the legal controversies concerning asymmetric conflicts, see Sassoli 2011, pp. 36–38.

[119] Dinstein 2006, p. 146; Sassoli 2010, p. 17, Thürer 2011, p. 49.

[120] Schmitt 2006, p. 22.

[121] This is on the basis of the prohibitions in Articles 51(2) and 52(1) of API.

[122] Note also that intentional use by a suicide bomber of civilian appearance to enable him to get close enough to his target to detonate the bomb would be perfidy; Schmitt 2003, p. 32.

undertake such an attack will render the putative attacker liable to prosecution and punishment.

Similarly, the use of improvised explosive devices is not per se unlawful. Depending on its precise characteristics, the weapon may comprise a mine, booby-trap or other device.[123] The weapons law applying to such a weapon will depend on the precise nature of the weapon, on how it is classified and on the treaties to which the relevant state is party. From a targeting law perspective, however, there is no legal objection to the use in an armed conflict of improvised explosive devices provided, again, that the targeting law rules that apply to all attacks, including the distinction, discrimination and precautions rules, are complied with.

Cyber warfare may offer additional and potentially lawful options to a party to a conflict that is asymmetrically inferior in terms of more traditional military weapons, financial or human resources.[124] However, with regrettable frequency asymmetrically inferior parties have chosen to adopt methods of warfare that systematically breach the law of armed conflict[125] and in the remainder of this discussion we will consider from a legal and ethical perspective whether the illegality of the asymmetrically inferior's conduct affects how the affected states should, or are permitted to, respond.

From a legal perspective, the simple and accurate answer is usually no.[126] International law does not, in most circumstances, recognize a right for a party to an armed conflict to consider itself absolved of the obligation to comply with that law by virtue of the breaches of the law committed by the other party.[127] As Michael Hoffman puts it, "[t]here may be a temptation to think that a barbarous enemy deserves a like response, but this is an invitation to legal, moral and political disaster".[128] Gary Solis makes the relevant point in this way,

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[123] Depending on how the device is designed to operate, it may be an anti-personnel mine under the Ottawa Convention 1998, a mine, booby-trap or other device under Protocol II to the Conventional Weapons Convention and/or one of the same three munitions under Amended Protocol II to the same Convention.

[124] Azar Gat, for example, comments that "high tech technologies have both polarized and democratized the balance between the more and less advanced sides in war, for the means to generate massive damage with pinpoint accuracy have been trickling down to below the state level, becoming available to non-state actors as well"; Gat 2011, pp. 39–40. Consider also the US Department of Defense Strategy for Operating in Cyberspace, July 2011, available at www.defense.gov/home/features/2011/0411_cyberstrategy/docs/DoD_Strategy_for_Operating_in_Cyberspace_July_2011.pdf, p. 3, noting the widespread availability of hacking tools, the low barriers to entry for malicious cyber activity, that individuals or small groups can potentially cause serious damage to US national or economic security and that small-scale technologies can have an impact disproportionate to their size.

[125] Pfanner 2006, pp. 151–153; Epping 2006, p. 5; Schmitt 2006, p. 39.

[126] Stefan Oeter notes the danger that both sides in asymmetrical situations neglect the principle of distinction; Oeter 2006, p. 56.

[127] For a powerful and reasoned condemnation of suggestions that either side in asymmetric warfare can legitimately engage in retributive violations of the provisions of international humanitarian law, see Thürer 2011, pp. 245–252.

[128] Hoffman 2005, p. 34.

"[b]ecause there are criminals at large, should we pursue them by becoming criminals? If terrorists film themselves beheading captives, shall we therefore behead our captives? We cannot allow ourselves to become that which we fight."[129]There is, however, an exception, namely reprisals. These are "extreme measures to enforce compliance with the law of armed conflict by the adverse party".[130]Reprisals have been authoritatively defined as "conduct which otherwise would be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war for the sole purpose of enforcing future compliance with the law of war".[131] Resort to reprisals is, however, only permitted in very limited circumstances.[132]If these limited circumstances do not exist, reprisals cannot be taken and illegal conduct of the asymmetrically inferior party to an armed conflict cannot justify breaches of international law by the asymmetrically superior party.

However, quite apart from the legal position, it would not be strategically sensible for an asymmetrically superior, let us assume western, state involved in an armed conflict to choose to breach the law in response to breaches by the inferior state or party. One of the critical strategic purposes for which western states engage in hostilities these days is to address unlawful conduct by the adversary or to bring respect for the rule of law and good order to a troubled region. There is an obvious conflict between such a purpose and the use of unlawful tactics, whether justified by reprisals motives or not.

At the philosophical level, numerous provisions of the law of armed conflict have been inspired by western moral thinking. Compliance with the law therefore involves compliance with moral appreciations widely accepted by western societies in general. That moral and ethical coherence is in marked contrast to parties to an armed conflict that engage in tactics which clearly breach the most fundamental and universally accepted moral and ethical rules. A party to an armed conflict that finds itself in an asymmetrically inferior position to such a degree that compliance with its own ethical and moral code would inevitably expose it to catastrophic defeat in war is truly confronted with a major moral dilemma. If it sacrifices its moral and ethical principles to be able to continue the fight, the morale of those undertaking the fight on its behalf is bound to suffer in the long run. The asymmetrically superior party should, in such circumstances, continue to occupy the moral high ground, should refuse to breach the law that reflects its own moral compass and should be assured that any ethical paradox implicit in the

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[129] Solis 2010, p. 11.

[130] UK Manual, para 16.16 at p. 418.

[131] US Field Manual 27-10, para 497; see also US Army JAG Operational Law Handbook (2008) at p. 24.

[132] See Henckaerts and Doswald-Beck 2005, rule 145, at p. 153 and see the commentary to that rule where the relevant conditions are listed. For the UK's declared position as to the reprisals prohibited by API see statement (m) made by the UK on its ratification of API on 28 January 1998. See also UK Manual para 16.17 on pp. 419–420 and as to unlawful reprisals, see Boothby 2012, pp. 515–516.

actions of the inferior enemy will, sooner or later, undermine its military effectiveness.[133] However, when breaches of international law by the opposing party to the conflict are systematic, egregious and the apparent application of a deliberate policy, and if brutal but lawful combat action in response is insufficient to address the situation, reprisal action that complies with the restrictive conditions referred to above may be the only viable option.[134]

6.5 Causes of Future Conflict

In this final subsection we briefly consider some foreseeable causes of future conflict and ponder whether they signify a fundamental change in armed conflict as we know it and whether they affect the applicable law. Clearly, many future conflicts will be attributable to the same factors that have given rise to conflict in the past, including the lust for power, wealth, control of people and resources, rebellion against oppressors, the quest for self-determination, the decay of empires, the fragmentation of composite states, organized crime, aggression, religious, ethnic, racial, tribal and other tensions, the overthrowing of dictators and so on. In the following paragraphs we will, however, focus on some of the new circumstances that also seem destined to cause future conflicts.

The current edition of UK Ministry of Defence's Strategic Trends,[135] following a comprehensive assessment of the current strategic context, identifies a complex of interrelated strategic trends. The following, in heavily summarized form, are just a few of the predictions set forth in the publication. It is suggested that: the incidence of armed conflict is likely to increase and that armed conflict will remain unpredictable; differences between state, state-sponsored and non-state adversaries will blur; soft power will increasingly be used to achieve political goals; the Chemical, Biological, Radiological and Nuclear threat from states and non-state actors is likely to increase; control of and access to hydrocarbons will remain important and states are likely to use defence forces to safeguard supplies; climate change will amplify existing stresses shifting the conflict tipping point rather than igniting conflict; radicalization, extremism and terrorism will continue to generate threats; network technologies will provide new opportunities for group formation,

[133] In this subsection the analysis has been deliberately limited to one form of asymmetry, namely technological. For a thorough discussion of the different forms that asymmetry may take and of its international law implications, see Schmitt 2006. Consider also Boothby 2006, p. 49. As to the wider philosophical underpinning of the law, note Louis Lafrance's view that "International Humanitarian Law …attains a universal dimension by symbolizing common human values"; Lafrance 2011, p. 99.

[134] If such action becomes necessary, explanation of it will need to be carefully thought through and presented.

[135] Ministry of Defence Strategic Trends Programme (2010), Strategic Trends out to 2040, Fourth Edition dated Feb 2010, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/33717/GST4_v9_Feb10.pdf (Strategic Trends).

many threats will operate transnationally requiring ongoing cooperation and multinational interoperability between security services; resource security will become an increasingly important issue for states, strategic shocks will occur, and

> success in future conflict, especially against adaptive and agile adversaries, will require a shift away from kinetic to influence activity, underpinned by a greater understanding of the enemy. This understanding will require more emphasis on intelligence gathering, cultural awareness, individual and collective training, and focused comprehensive approaches.[136]

Any of these trends has the capacity to develop in such a way as to call into question the current legal framework for armed conflict. In the following paragraphs, however, we will consider briefly the blurring of the differences between state, state-sponsored and non-state adversaries, the tendency for network technologies to provide new opportunities for groups to form and perhaps operate transnationally and the foreseen shift from kinetic to influence activity. It may be useful to consider some legal implications of each of these predictions in turn.

If the differences between state, state-sponsored and non-state adversaries do indeed fade, the basis for characterisation of an armed conflict as international or non-international erodes. This has the clear and obvious consequence that the law that applies to the conflict is destined to become unclear; it will not, for example, be possible to say whether prisoners are entitled to prisoner of war status, whether participants in the conflict have combatant status and thus have combatant immunity, whether the weapons law rules that apply to the conflict are those pertinent to international or non-international armed conflicts and so on. It is not clear whether such an erosion may also have the effect that the law itself may change. If the distinction between the two classes of armed conflict becomes less distinct, the justification for having discrete bodies of law applying to each may diminish. This suggests that at some point the bodies of law may merge, but this prospect would seem to be very remote.

The formation of groups, and indeed of looser networks of individuals who share political goals, and a common willingness to use violence in whatever form to achieve them, poses a clear challenge to national authorities. Using network technologies to enhance the ability of the group to form, to communicate among themselves and externally, to formulate plans of action, to coordinate activities generally, to recruit new members, to acquire funds and so on will intensify that same challenge. Monitoring activity on such networks will involve the deployment of scarce national resources and may be technically challenging. It may not be clear whether the group is sufficiently organized for the conflict to be characterized as an armed conflict. In the same way that factors discussed in the previous paragraph have the potential to erode the distinction between international and non-international armed conflict, the formation of loosely connected transnational common interest groups may have the potential to challenge the distinction between armed conflict and internal security situations that fall short of armed conflict. It may therefore be difficult to determine whether a situation is governed

[136] Strategic Trends, pp. 15–18.

by the law of international armed conflict, the law of non-international armed conflict or, indeed, by applicable domestic law. It is of course already the case that in a single state or geographical area all three classes of conflict can be occurring at the same time, with the result that care is required to ensure that armed forces fully understand the rules that apply, for example as to targeting, in the various foreseeable circumstances. Networking of groups as discussed in this paragraph has the potential to deepen these ambiguities by making it difficult for armed forces to determine the status of those they oppose and thus the nature of the conflict in which they are engaged.

If the shift from kinetic to influence activity were to be total, this would raise the question whether an armed conflict is going on at all.[137] Similarly, if as another of the identified strategic trends concludes, soft power will increasingly be used to achieve political goals, this might imply increasing reluctance to resort to the degree of force necessary to constitute an armed conflict, a welcome development one would suggest; this will, however, affect fundamentally the legal basis on which action, whether military or otherwise, is being taken. If there are no hostilities at all, there is no armed conflict and if there is no armed conflict it is domestic law that regulates the actions of all parties including police and armed forces personnel. At the international law level, the principle of sovereign equality,[138] the obligation to settle international disputes in such a way as not to endanger international justice, peace and security[139] and the obligation not to threaten or use force in any way that is inconsistent with the UN's purposes as reflected in the UN Charter will be some of the rules that will determine whether action by one state to influence another amounts to a breach of international law. However, it should be borne in mind that if the armed conflict threshold is not reached and peacetime law therefore applies, treaties that regulate the peacetime activities of states will also determine the lawfulness of action that is taken. Such treaties cover very many activities, for example environmental protection, international telecommunications, hazardous waste disposal, civil aviation, maritime navigation and so on. Significantly, while arms control treaties such as the Chemical Weapons Convention and the Biological Weapons Convention will continue to apply,[140] the prohibition on the use of riot control agents as a method of warfare will not apply owing to the absence of a state of armed conflict.[141]

Strategic Trends opines that the emphasis in future operations will be on intelligence gathering, cultural awareness, individual and collective training, and focused comprehensive approaches. Cultural awareness is already clearly a vital ingredient in the successful prosecution of effects-based, and indeed most modern

[137] This would depend on the factors discussed in Chap. 2.

[138] UN Charter, Article 2(1).

[139] UN Charter, Article 2(3).

[140] This is due to the all-embracing nature of the obligations that these treaties contain, for example prohibiting possession, stockpiling, transfer and so on; see Boothby 2009, Chap. 9.

[141] Boothby 2009, pp. 135–136.

military operations. It is the emphasis on intelligence gathering, on understanding of the adversary and on comprehensive approaches that have the potential to affect the current legal framework. Put simply, in the future it may be difficult during an armed conflict to determine where military operations governed by the law of armed conflict end and other kinds of operation not governed by that body of law begin. It remains to be seen how states will view cyber information gathering operations undertaken by the state security, central intelligence or government communications organizations that target sensitive national data and computer controlled facilities of another state in such a way as to cause damage, injury or financial loss. While some such action is undoubtedly capable of constituting an unlawful use of force and even, if the consequences are severe enough, an armed attack, if states routinely tolerate such activities, for example because they routinely engage in them themselves, those possible characterisations may cease to be valid.

From an arguably more practical perspective, if the future emphasis is indeed on operations falling short of armed conflict, armed forces will need to know more about the domestic law that applies in states to which they are deployed as that law will help to determine the scope of their lawful activities. Immunities from host state jurisdiction will need to be negotiated with care and will need to be properly understood and applied by all those involved.

However, the author believes that conventional, brutal, bloody war as we have known it all too frequently in the past will continue to defile significant parts of our planet far into the future. Embarking on the use of force is something that should be done with extreme reluctance and only after absolutely all alternative avenues have been pursued or rendered inappropriate. When force is resorted to, it should be carefully measured and the objective should always be the restoration of peace at the earliest moment. Conflicts that may start by employing clinical techniques based on modern technology can, and assuredly will, all too readily descend into engagements involving heavy casualties for all parties. At this juncture in the twenty-first century, compliance with the letter and spirit of Article 2 of the UN Charter must become a global priority.[142]

6.6 Conclusion

The means, methods and nature of conflict are not the only variables that are of relevance to this discussion. The law itself is not set in immutable stone. It has largely been created and developed, in both customary and conventional form, within the last century and a half and, while the law may not be as responsive as some of us would like, that process of development is nevertheless liable to continue. Previous change in the law has been the product of battlefield, and broader, experience. It is to be expected therefore that some, but not necessarily

[142] Consider the account of warfare over the last 2,500 years in Murray 2012.

all, of the evolutions in means, methods and nature of conflict that we have identified will generate legal change. However, the law is traditionally slow to reflect changes in weapons technology and the conventional law regulating the conduct of hostilities has yet to make specific provision in relation to warfare in outer space and in cyberspace. It has therefore probably been realistic to conduct this analysis of new methods and of the evolving approaches to conflict by reference to the law of armed conflict rules that we have. Whether there will be changes in that law to reflect the new ways of doing things remains to be seen. The detail of such change, and indeed its timing, are unknown, but the author suspects that only when major states conclude that opportunities offered by perceived gaps in the law are outweighed by the dangers they imply will there be any meaningful initiative towards addressing such gaps.

Traditional armed conflicts will continue to be fought both between states and within states, and the existing body of law will therefore continue to have relevance, probably for the overwhelming majority of future wars. Remote attack will become an increasingly significant feature of how some wars are fought, and attackers who remain invulnerable in practical terms because of their remoteness from the scene of the attack will continue to challenge the practical implementation of accountability while raising difficult moral and ethical issues.

There will be those who continue to argue for an effects-based approach that erodes the foundations of the principle of distinction. The International Court of Justice has described the principle as 'intransgressible', and so it will remain for the foreseeable future. However, the changing nature of armed conflict seems set to challenge even that core principle of the law, as technology makes attackers increasingly remote, as future methods of warfare increasingly employ machines to decide on, and prosecute, attacks and responses to attacks and as asymmetric armed conflicts pit forces undergoing these radical changes in modi operandi against asymmetric inferiors who seem routinely to use civilians to target civilians. Holding the principle of distinction sacrosanct against those strategic influences is going to be a fraught, but nevertheless worthy, task. After all, distinction protects the weak, the vulnerable, the innocent and the victims. It is vital that some vestige of civilization be maintained in the chaos of future conflict, and this will only be so if the distinction principle is defended, maintained and implemented.

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Chapter 7
People and the Legal Spectrum of Conflict

Contents

7.1 Introduction

The conduct of hostilities is, traditionally, a fundamentally human undertaking and people are involved in war in a wide variety of ways. In terms of very broad groupings there are, firstly, those who involve themselves in actually conducting the fight, whether as combatants or as civilians who take a direct part in the hostilities. The law protects such people in certain respects.[1] Another group would

[1] Consider, for example, the customary rule in API, Article 35(1) and the similarly customary rule in Article 35(2) that prohibits weapons of a nature to cause superfluous injury or unnecessary suffering.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_7,

comprise civilians who remain out of the fight and who by doing so retain protected status under the law of armed conflict.[2] A third loose group would consist of persons who, because of their activities or status, have specific protection under the law, including medical personnel, religious personnel, those who are *hors de combat,* the wounded and sick on land, the wounded sick and shipwrecked at sea, prisoners of war and civilians who are in the hands of an adverse party to the conflict. Civil defence personnel, those with particular responsibilities for cultural property, war correspondents, journalists on dangerous missions, members of certain humanitarian organisations such as Red Cross or Red Crescent societies, parlementaires, and numerous other types of individual would also come within this group as they are all the subject of specific protective provision in the law.

We discussed in Chap. 2 adjustments that might foreseeably emerge in the spectrum of conflict. In Chaps. 5 and 6 we looked at some new technologies and their implications for the way in which wars are fought. The purposes of the present chapter are to set out in summary form the law as it applies to people who are involved in or affected by conflict and to reflect on how those matters may change in response to changes in the spectrum and technology of conflict. We shall review in the first group of Sections how the law categorises the users of violence in modern conflicts. This will inevitably require us to consider the legal controversies as to the circumstances in which civilians lose their protected status by involving themselves in the hostilities associated with an armed conflict. We must address this issue because of the evident trend for states to involve civilians in military activities to an increasing degree and because the employment of new means and methods of warfare seems likely to require the increasing use of skills that are often mainly in civilian hands. In the second group of Sections we will look at those whom the law would protect from attack and in the third group of Sections we will try to determine whether the future nature of conflict has implications for people and for the law of armed conflict as it applies to them.

One point should, however, be made abundantly clear at the outset of this discussion. For states that are party to API, there are only two classifications of people. A person is either a member of the armed forces or he is a civilian. Sir Adam Roberts identifies a number of factors that suggest that the situation of civilians in today's armed conflicts and occupations is hugely problematic. He points specifically to campaigns of ethnic cleansing or of political/religious fanaticism, to guerilla warfare, to terrorist campaigns, to the use of civilian contractors, to the involvement of armed forces in humanitarian activities, to effects-based war, to law fare, to the active role of civilians *vis-à-vis* hostilities and to the reluctance of some military occupiers to accept full legal obligations. He notes, however, that the principle that civilians should not be attacked is widely accepted and that the many efforts to protect them, in law-making and in the work of states, international organizations and of NGOs has achieved some significant results; in short the distinction between combatant and civilian is likely not just to endure but

[2] API, Article 51(1).

to retain its political, legal and moral salience.[3] There is no additional or intermediate category between members of the armed forces and civilians.[4]

7.2 The Users of Violence in Modern Conflicts

7.2.1 Armed Forces and Combatants[5]

Armed forces, for states party to API, comprise

> all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.[6]

During international armed conflicts, all such individuals are combatants,[7] with the exception of medical and religious personnel, and thus have the right to participate directly in an international armed conflict.[8] However, members of a *levee en masse* as referred to Article 2 of the Hague Regulations and in Article 4A(6) of Geneva Convention III, are also included within the notion of combatants provided they carry their arms openly and respect the laws and customs of war. A paramilitary or armed law enforcement agency may be incorporated by a Party to the conflict into its armed forces but if this occurs the other Parties to the conflict must

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[3] Roberts 2011, pp. 374–377.

[4] Rogers 2012, p. 39.

[5] For discussions of the enduring debate as to the use of the terms 'combatant', 'belligerent', and 'unprivileged belligerent', see Garraway 2007, Pejic 2007 and Corn et al. 2012, pp. 143–148.

[6] API, Article 43(1). So, for example, the Estonian Cyber Defence League is a unit of the Defence League, a voluntary military non-governmental national defence organization; Gelzis 2011, available at www.dw.de/estonian-voluntary-cyber-soldiers-integrated-into-national-guard/a-14968102.

[7] API, Article 43(2). For an account of the historical evolution of the notion of 'combatant' and for a discussion of the significance of its use in API, see Green 2008, pp. 125–138 and for a general account of the notion of 'combatant', see Kolb and Hyde 2008, pp. 197–207 and Kalshoven and Zegveld 2011, pp. 33–35.

[8] Hague Regulations, 1907 Article 3 and API, Article 43(2). Knut Ipsen makes the points that members of the armed forces who are non-combatants are the exception rather than the rule; that non-combatants refers to medical and religious personnel and other members of the armed forces not authorized to participate directly in hostilities; and that the status of various groups of service personnel is determined by national decision in accordance with legal principles. He identifies the essential relationship here as being between a state, as a subject of international law, its armed forces as its organ and the members of the armed forces as combatants, and notes that the generic international legal meaning of the term 'combatants' is "persons who may take a direct part in the hostilities, that is participate in the operation or control of a weapon or a weapon-system in an indispensable function"; Ipsen 2013, pp. 80–82.

be informed.[9] This means that they have combatant immunity for their hostile activities that comply with the law of armed conflict and that are undertaken in connection with such armed conflicts. It also means that they are liable to be attacked at all times during the armed conflict, including when they are retreating.[10] Under API, the obligation is that combatants distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.[11]

It should be noted that States that are not party to Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) will look to the four criteria prescribed in Article 1 of the Hague Regulations and repeated in Article 4A(2) of Geneva Convention III and will require compliance with all of these as a condition precedent to combatant status and immunity, and thus to prisoner of war status on capture.[12]

Members of armed forces of states are, generally speaking, disciplined in the sense that they are subject to a military code of discipline compliance with which is enforced by means of penal sanctions. Superior orders must be complied with, unless manifestly unlawful,[13] and failure to comply is addressed in accordance with the disciplinary code. Individuals have personal responsibility for their breaches of the law of armed conflict,[14] and this extends to the responsibility of commanders[15] and of those in an analogous position of superiority.[16] Indeed, the existence of a command structure and of an "internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in

[9] API, Article 43(3).

[10] Dinstein 2010, pp. 102–103.

[11] API, Article 44(3). Mike Schmitt points out that their failure so to distinguish themselves is not a violation of the law of armed conflict; it merely causes them to lose combatant status and its associated benefits; Schmitt 2006, p. 24.

[12] Wall 2007, p. 419. Yoram Dinstein identifies seven conditions that must be complied with, namely the four conditions set out in Article 1 of the Hague Regulations (subordination to responsible command, a fixed distinctive emblem, carrying arms openly and conduct in accordance with the law of international armed conflict) together with an additional three, namely a hierarchical framework, embedded in discipline and subject to upper echelon supervision; belonging to a Party to the conflict; and non-allegiance to the Detaining Power; Dinstein 2010, pp. 43–47. Note that the prescriptive criteria are also to be found in Geneva Conventions I and II, Article 13. As to the consequences of failure to comply with the conditions, consider *Mohammed Ali et al v. Public Prosecutor* (1968), [1969] AC 430 (Privy Council) and Ex Parte Quirin et al. (1942) 317 US Supreme Court Reports 1. Yoram Dinstein concludes that there is a presumption that by their nature members of the armed forces would meet the prescribed conditions but that the presumption can be rebutted; Dinstein 2010, pp. 42–43 and see Corn 2012, p. 138.

[13] Rome Statute 1998, Article 33(1)(c).

[14] Rome Statute 1998, Article 25.

[15] As to the impact on command responsibility of the radical increase in available information that characterizes modern conflict, see Garraway 2013, p. 187.

[16] Rome Statute 1998, Article 28, paras (a) and (b) respectively.

armed conflict"[17] are essential requirements for a group to have the status of 'armed forces' and thus for its members to have combatant status.

Members of an organized armed group that is under responsible command and that enforces compliance with the law of armed conflict are therefore entitled to combatant immunity in international armed conflicts. The changing nature of conflict and possible adjustments in the legal spectrum to which we referred in Chap. 2 do not seem likely to affect this aspect of the law of armed conflict as it affects state on state armed conflicts. Self-evidently, if Article 1(4) of API were to be revoked by amendment in the manner discussed in Chap. 2, this would have the effect that any future conflict of the sort referred to in Article 1(4) would be characterized as a non-international armed conflict with the result that combatant status, and immunity, would not arise.

The other main group of individuals who may be involved in use of violence in the course of an armed conflict comprise civilians, and their legal status will be discussed in the next section.

7.2.2 Civilians Who Directly Participate in Hostilities

Much has been written and much heat has been expended in the attempt to clarify the notion of direct participation in hostilities. Article 3 common to the Geneva Conventions requires that humane treatment be accorded in all circumstances to "persons taking no active part in the hostilities". In API, Article 51(3) provides that "civilians shall enjoy the protection afforded by this Section [of API], unless and for such time as they take a direct part in hostilities". Article 13(3) of Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII) contains a similarly worded provision. However, the Geneva Conventions, API and APII contain no clarification of what exactly is meant by the term 'direct part in hostilities'. This is strange because the notion is of very considerable significance. It marks the distinction between on the one hand persons who must be protected from the effects of military operations and who must not be made the object of attack,[18] and, on the other, individuals whom, because of their activities, it is

[17] API, Article 43(1).

[18] Indeed, making such civilians the object of attack is a war crime; Rome Statute, 1998, Article 8(2)(b)(i) and 8(2)(e)(i). Consider the point made by Yoram Dinstein: "If the lines separating civilians from combatants blur, there is a palpable risk that (to be on the safe side) the enemy will treat all persons encountered in or near the contact zone of military operations on land as if they were combatants, and then the 'principle of distinction' will be swept aside"; Dinstein 2007, p. 150. With evident relevance to notions of a revolving door of protection as reflected in Melzer 2009, he comments: "customary international law does not offer the option of being both a civilian (by day) and a combatant (by night)"; Dinstein 2007, pp. 150–151.

lawful directly to target and who on capture can be prosecuted for their violent acts.[19]

The International Committee of the Red Cross and the Asser Institute therefore convened a series of meetings of Experts from 2003 to 2008 with the explicit purpose of seeking to clarify the meaning of the notion. While the experts generally agreed about certain limited peripheral matters, there was an absence of consensus on the significant points, and the process ended without overall agreement.[20] Following the final meeting, the ICRC decided on its own initiative to publish Interpretive Guidance on the subject.[21] That publication was also the subject of controversy.[22] The Interpretive Guidance has, however, had the valuable effect of producing a discussion of these issues where none previously existed. The Guidance itself, and the associated debate in the literature, have had the combined effect of clarifying a number of relevant points, as we shall see below, and have advanced the discourse considerably.

The purpose of this section is not to become immersed in the detailed technicalities of those controversies, although some elements of them must unavoidably be referred to. Rather, it is to take as a starting point certain fundamental propositions about which most involved in the debate would generally agree. The author then proposes to discuss what direct participation consists of in the context of modern and emerging conflicts and to evaluate the implications of the notion for future ways of conducting armed conflicts.

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[19] As to the applicability of domestic law to persons who engage in hostilities when not combatants, see Baxter 1952, and Ipsen 2013, pp. 82–83. As to the significance of direct participation as a potential basis for establishing a link between the individual and the relevant group, consider Ohlin 2011, available at www.scholarship.law.cornell.edu/clsops_papers/92, pp. 65–70 and 81–85. See also Stone 1954, p. 549 and Corn et al. 2012, pp. 150–156.

[20] Personal knowledge of the author who was a member of the Group of Experts and who attended all of the meetings except the first.

[21] Melzer 2009 (Interpretive Guidance).

[22] See the New York University Journal of International Law and Politics 42(3) (Spring 2010), which includes an extensive Forum on the topic including critiques of the Interpretive Guidance and a response by Nils Melzer. Consider also Ken Watkin's argument that making insurgents harder to target lawfully than members of state armed forces does not enhance protection of civilians; Watkin 2012, p. 10. Note Marsh and Glabe 2011; Boothby 2012, pp. 141–164; and Solis 2011, pp. 202–206. For an evaluation of the concept of direct participation in hostilities, of the time periods during which it can properly be regarded as applying and of the concrete activities that can sensibly be interpreted as coming within the notion, see Dinstein 2010, pp. 146–152 and for a discussion of the complex question of whether voluntary human shielding can be regarded as direct participation, see Dinstein 2010, p. 154. Only where the shielding activity is genuinely and unambiguously voluntary can it be regarded as direct participation. This will not be the case with human shields who are children. Where there is doubt as to their voluntary nature, they should be regarded as involuntary human shields and should therefore be considered when the proportionality of the proposed attack is being evaluated but "the enemy's unlawful activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected"; UK Manual 2004, para 5.22.1.

The first thing to appreciate is that the direct participation in hostilities notion only applies to civilians and that the term 'civilian' comprises all persons who are not combatants.[23] The notion does not therefore apply for example to members of an organized armed group that is under responsible command and has an internal discipline system that enforces compliance with the law of armed conflict. Such individuals are, by virtue of Article 43(1) and (2) of API, members of the armed forces; they are therefore combatants and thus are liable to be attacked at all times during an international armed conflict and have combatant immunity. This would extend to members of dissident armed forces who comply with the same conditions of command and discipline.

Members of organized armed groups that do not comply with the stated conditions, members of armed groups that are not organized and civilians who participate directly in hostilities without being a member of any armed force or group do not have the status of combatant and are therefore civilians.

Certain propositions on which the current discussion of 'direct participation' is based were summarized by the author when writing on these matters elsewhere.[24] These propositions can be briefly stated as follows:

- That the protection of civilians from attack is conditional upon their abstaining from taking a direct part in hostilities;
- That supporting the war effort in general is not the same thing as taking a direct part in hostilities, because general support lacks any sufficiently direct involvement in the hostilities; accordingly, those who only give general support may not be made the object of attack on that basis;
- That the rights to participate directly in hostilities and to immunity from prosecution for hostile acts that comply with the law of armed conflict are limited to combatants;
- That members of an organized armed group with any kind of combat function, continuous, temporary or contingent, are at all times liable to be lawfully attacked while they remain members of the group;
- That those who must distinguish between persons whom it is lawful to attack and persons who are entitled to protection from attack must make their decision in good faith and on the basis of their interpretation of the information from all sources that is reasonably available to them at the relevant time[25];

[23] API, Article 50(1). Yoram Dinstein concludes, evidently in relation to states not party to API, that combatants include non-members of the armed forces who take a direct part in the hostilities; see Dinstein 2010, p. 33. Combatants as defined in API consist exclusively of combatant members of the armed forces and of members of a *levee en masse*. It follows that the notion of unlawful combatancy, as to which see Dinstein 2010, pp. 33–39, is irreconcilable with the terms in which API, Article 43(2) is expressed, and Dinstein acknowledges that the general distinction between lawful and unlawful combatants is completely subverted; Dinstein 2010, p. 51. Gary Solis also comes to the conclusion that 'unlawful combatancy' does not describe a third category of person, and that unlawful combatants are a subset of civilians; Solis 2011, p. 208.

[24] Boothby 2012, pp. 162–163.

[25] See UK statement (c) on ratification of API on 28 January 1998.

- That civilian members of an organized armed group who have no combat function and who abstain from direct participation in hostilities retain civilian status and thus must be protected at all times from attack;
- That these principles apply equally to the employees of civilian contractors to the armed forces, so that if those employees, whether in the exercise of their duties or otherwise, take a direct part in the hostilities they will be liable to be attacked lawfully by the adverse Party and to be prosecuted for their violent acts in connection with the armed conflict[26]; and
- That the law does not require an attacker to presume in case of doubt that a civilian is not participating in an armed conflict.

The ICRC is right to conclude that there are some important constituent elements to direct participation. The Interpretive Guidance refers to the threshold of harm, which it defines as the likelihood of the relevant act "to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack".[27] So to constitute direct participation the civilian's act does not have to engage an adverse party's military objectives or combatants; unlawful attacks can also form the basis of direct participation. The narrative accompanying this constituent element makes it clear that 'harmful to the enemy' is interpreted somewhat liberally, and is clearly intended to encompass activities against the enemy's interest, such as clearing mines laid by the enemy, but which actually benefit the actor's own party to the conflict. The Guidance specifically observes that electronic interference with military computer networks could also suffice as could wire-tapping the enemy's High Command.[28]

The second constituent element suggested by the ICRC requires that "there must be a direct causal link between a specific act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part".[29] This element draws the distinction between direct and indirect participation in hostilities, making the valid point that it is only the former that deprives the civilian actor of his protected status. This reflects the accepted distinction between taking part in the fight, as it were, and what might be considered general support for the war effort such as is to be expected from the population in general and which does not justify direct attack on the civilians concerned.

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[26] See however the comments as to the practical ability to exercise jurisdiction in Boothby 2012, p. 163 and at n. 118 thereto.

[27] Melzer 2009, p. 47. The associated clarification in the Interpretive Guidance makes the point that the requisite harm does not have to materialize; it is the likelihood that it will arise i.e. that it may reasonably be expected to result from the act that matters. Tony Rogers produces a list of twenty activities by civilians in the course of hostilities, and takes the view that taking a direct part in hostilities should be narrowly construed, both in terms of the activity and its duration as in his view otherwise civilian protection is placed severely at risk; Rogers 2012, pp. 14–15.

[28] The Interpretive Guidance also cites transmitting tactical targeting information for an attack as a possible example; Melzer 2009, p. 48.

[29] Melzer 2009, p. 51.

The third constituent element requires a belligerent nexus, that is, that the act "must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another".[30] This rather reinforces the point that acts that benefit the actor's own party to the conflict are capable of constituting direct participation. It also recognizes that during an armed conflict, individuals may engage in, for example, violent criminal activity that is unconnected with the armed conflict but in which the required threshold of harm is caused. The absence of belligerent nexus would mean that such activity would not amount to direct participation in the armed conflict and would, rather, constitute ordinary criminal activity to be dealt with in accordance with the domestic criminal law. The Interpretive Guidance correctly concludes that the decision as to belligerent nexus boils down to a decisive issue, namely "whether the conduct of a civilian in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the requisite threshold of harm to another party".[31]

The next aspect for us to consider is which of the numerous types of activity associated with an armed conflict seem to satisfy the constituent elements that we have discussed. We should start by considering activities associated with current methods of warfare in order by doing so to seek to clarify the practical application of the notion with a view, then, to being able to apply it to future technologies and methods of warfare.

Clearly, the performance of a violent act in furtherance of the conflict, such as firing a rifle or mortar at combatants belonging to the opposing party to the conflict, will satisfy the constituent elements. Equally, giving orders to subordinates will be direct participation where the subordinates are subject to the actor's authority and where the order is to commit an act which, itself, amounts to direct participation in the armed conflict, such as the performance of a violent act constituting an attack. If the civilian actor is integral to a multi-agency or multi-actor operation that causes the requisite harm to the adverse party but in which the actor does not himself hold the weapon or direct the munition, this will also, in the author's view, constitute direct participation.[32]

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[30] Melzer 2009, p. 58.

[31] Melzer 2009, p. 64. As the Interpretive Guidance goes on to note, "all feasible precautions must be taken to avoid erroneous or arbitrary targeting"; Melzer 2009. The Interpretive Guidance then asserts that in situations of doubt, the person concerned must be presumed to be protected from direct attack, a proposition for which there is no legal basis; there is at law no basis for a suggested presumption that a civilian is not directly participating in hostilities; Boothby 2012, p. 149.

[32] Consider the example of the setting of an IED, which may involve a multiplicity of actors, including those who acquire and collect the ingredients, those who assemble them, those who prepare the device for actual use, those who decide where the device is to be placed, those who keep watch while the operation to deploy the device is undertaken and those who actually deploy the IED. Schmitt comments that "few states would hesitate, on the basis that the action is not 'direct enough', to attack those in the process of assembling IEDs"; Schmitt 2010a, p. 731. Contrast the civilian munitions factory worker who is broadly accepted as not directly participating in hostilities and thus as retaining protected civilian status. The basis of the

If the use of a weapon system requires an operator to load target data into the weapon's controlling software, the person who performs that task would seem to be directly participating, as would the person who provides intelligence data to an operator of a remotely piloted combat vehicle on an attack mission. While the belligerent nexus between the civilian's act and the hostilities is something that the person contemplating an attack on the civilian can only infer from the information available to him, it will at least sometimes be obvious. Thus the belligerent nexus is self-evident where a civilian assembles an IED to be used by another member of the same operational team to target an enemy patrol. Similarly, the belligerent nexus will be manifest when a civilian contractors' employee feeds target acquisition data into the weapon control system of a fighter jet in anticipation of a planned mission against a known target.

There are some categories of activity which will almost always be direct participation, such as taking up a gun of any caliber or any other weapon or in some other way attempting to kill, injure or capture personnel belonging to the adverse party, attempting to destroy the property of the adverse party or firing any kind of weapon at the adverse party; acting as a look-out or guard; undertaking intelligence activities for military forces[33]; conducting sabotage operations[34]; taking part in armed fighting including attacks on enemy personnel, property or equipment; transmitting military information for the immediate use of a belligerent and transporting weapons close to combat operations[35]; undertaking offensive or defensive military operations against the enemy; supplying intelligence for such operations; loading ammunition for such operations,[36] directing or guiding platforms undertaking such operations, planning such operations[37] and ordering the undertaking of such operations.[38] It will be seen from these examples that a fairly

(Footnote 32 continued)
suggested distinction is that those involved in the assembly of an IED are integral to the operation to use it, an operation likely to take place soon after, and either in the relative vicinity of its assembly or at least at a known location. The munitions factory, on the other hand, is usually remotely located from the scene of operations producing munitions for generic use in connection with the armed conflict on unspecified future occasions. On this basis it would be difficult to describe the manufacturing process as integral to any particular operation; Schmitt 2010a, p. 731 and Meyrowitz 1981, pp. 22–23.

[33] NWP 1–14 M, para 8.2.2.

[34] UK Manual 2004, para 5.3.3.

[35] *Prosecutor v. Strugar*, Case No. IT-01-42-A, Appeals Chamber judgment (17 July 2008) at paras 176–179; see also HCJ 769/02 *Pub Comm against Torture in Israel v. Gov't of Israel* (Targeted Killings) (2005) at para 35.

[36] The loading of ammunition on an aircraft in preparation for a particular sortie is cited in the Interpretive Guidance as an example of direct participation; Interpretive Guidance at p. 66.

[37] Walzer 2004, pp. 139–140.

[38] It should be noted that if the civilian political leadership involves itself in tactical military decision making, for example in relation to decisions as to which targets should be attacked in an air campaign, this may well constitute direct participation in the hostilities thus rendering those persons liable to be attacked while engaged in those activities. Consider the involvement during the 1999 Kosovo campaign of "the President of the United States, the prime minister of Great

close association is required between the civilian's act and the resulting harm to the enemy for that act to be direct participation.

Whether certain other combat-related activities satisfy the constituent elements of direct participation will frequently depend on the relevant circumstances. Examples of these other kinds of activity include ground refueling of attack platforms, servicing warships, military aircraft and military vehicles, repairing military equipment, transporting ammunition and military supplies[39] and controlling unmanned vehicles other than in the vicinity of combat. In any such case, regard must be had to the context in which the activity is undertaken, the exact nature of the relevant acts and, in particular, how close the association is between what the civilian does and a particular attack or operation. If the civilian's activity is an essential part of the operation or if the civilian was clearly intending that his actions should benefit, or as the case may be adversely affect, the military situation of a party to the conflict, these will also be relevant factors in the decision as to whether the civilian is directly participating.[40]

The treaty language deprives the civilian of protection from attack 'for such time as' he participates directly. Exactly how this translates into times when the civilian may and, respectively, may not be attacked is also the subject of some controversy.[41] Again, it is not necessary for us to discuss the minutiae of that controversy. Rather, the purposes of the present chapter will be better served if we set out some rather more fundamental propositions on the matter as follows.

The period during which a directly participating civilian loses protection is not limited to the time when he is actually performing the relevant act, but includes acts undertaken in preparation for hostilities.[42] There is an inevitable tendency in this discussion for the attempt to clarify one concept to throw up another requiring similar clarification. So here, one could sensibly ask what preparation comprises. The sensible view seems to be that acts of preparation consist of activity placing

(Footnote 38 continued)
Britain, the President of France and the president of Germany" in targeting decisions; Short 2002, p. 23. Consider also *Prosecutor v. Aleksovski* Case No IT-95-14/1-A, Judgment dated 24 March 2000 at para 76 and *Prosecutor v. Delalic et al*, Case No IT-96-21-A, Judgment dated 20 February 2001, para 197. For the capacity of modern instant communications media to short-circuit the command chain, consider Garraway 2013, pp. 201–202 where Barack Obama's observation of the attack on Osama bin Laden's hideout in Pakistan and Margaret Thatcher's order to sink the General Belgrano during the Falklands War are discussed.

[39] See Queguiner 2003 International Humanitarian Law Research Initiative, November 2003, available at www.ihlresearch.org/ihl/pdfs/briefing3297.pdf as to the extent to which logistic support can amount to direct participation.

[40] Consider Eric Jensen's point that advancing technology will increase the risk of civilians becoming unwitting direct participants; Jensen 2013, p. 18.

[41] Boothby 2010, 741–768 and Melzer 2010, pp. 879–892.

[42] Consider API, Article 44(3) and Sandoz et al. 1987, para 1692 and note Interpretive Guidance at pp. 65–67. Such preparatory acts would include instructing, equipping and transporting personnel, gathering intelligence, preparing, transporting and positioning weapons and equipment all in preparation for undertaking a specific hostile act; Interpretive Guidance at p. 66.

the civilian or another person in a position to be able to undertake the hostile act.[43] There is a proper distinction to be drawn between activity designed to create a general capacity to undertake military operations, which does not amount to direct participation, and acts preparatory to combat, which do.

Deployment to and return from the scene of combat activity constitute integral parts of the act of direct participation.[44]

Civilians who participate directly in the hostilities on a regular, repeated or persistent basis lose their protection throughout the period covering the regular, repeated or persistent incidents of participation. This conflicts with the ICRC view. The ICRC considers that the 'revolving door of protection' as it has been termed, with a person who is a fighter by night and a farmer by day losing and regaining protected status with each specific act of direct participation, is an integral part not a malfunction of international humanitarian law.[45] Others, however, take the view that the 'revolving door' is indeed a malfunction, is not the law and would prejudice the important balance between military necessity and humanitarian concern.[46]

In the ICRC view, members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection from attack for as long as they assume a continuous combat function. This part of the Interpretive Guidance starts with the proposition that members of organized armed groups are deprived by international humanitarian law of protection against direct attack for as long as they remain members of that group. That membership

> begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function. Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behavior, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combatant function (e.g. political or administration activities). In practice, assumption of, or disengagement from, a continuous combat function depends on criteria that may vary with the political, cultural, and military context.[47]

This requirement for a continuous combat function is controversial because of the imbalance it generates between the situation of members of the armed forces who can be targeted at any time during an armed conflict and members of such organized armed groups who can only be targeted continuously if they have a continuous combat function.[48]

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[43] Sandoz et al. 1987, para 1692 and Boothby 2010, p. 749.

[44] Interpretive Guidance, at p. 65 and see Boothby 2010, pp. 750–752.

[45] Interpretive Guidance, at p. 70.

[46] See Watkin 2010, pp. 686–690; Schmitt 2004, p. 510 and Boothby 2010, pp. 753–758.

[47] Interpretive Guidance, p. 72.

[48] As to the notion of 'belonging to' a party to the conflict, *Prosecutor v. Tadic*, Appeals Judgment, Case Number IT-94-1-A, 15 July 1999 at para 94 identifies control of the irregulars by a party to an international armed conflict and a relationship of dependence and allegiance between the irregulars and that party as the ingredients of the term; see also the discussion in Dinniss 2013, pp. 261–263.

After a period of regular, repeated or persistent direct participation in hostilities of the sort referred to in the previous sub-paragraph, the civilian must undertake an affirmative act of disengagement or there must be an extended period of non-participation in order to establish that he is no longer a direct participant. If no such affirmative act or extended disengagement has occurred, the civilian remains continuously targetable on the basis of his previous regular, repeated or persistent direct participation.[49]

It follows from this discussion that individuals who may not consider themselves to be directly involved in the fight, and who certainly would not expect themselves to be liable to be attacked lawfully by the opposing party to an armed conflict, may indeed be directly participating in it with the dangerous consequences that we have already explained. The political leader who goes beyond the setting of the strategic political agenda for an armed conflict and becomes involved in target clearance decisions may, depending on the precise nature of his role in targeting, be a direct participant.[50] The scientist, if he is for example centrally involved in the development of a special weapon for use in a particular planned attack against a known military objective, may be a direct participant in that attack because of his integral role. The civilian contractors' employee, a computer expert, who is feeding target location data into a computer that directs a weapon to target may well be regarded as directly participating in the relevant attack. If such roles are performed by persons who would traditionally be automatically regarded as uninvolved civilian victims of an armed conflict, namely women and children, they also may thereby become direct participants in it. Nevertheless, it must always be remembered that women and children are generally likely to be and to remain most vulnerable groups in any armed conflict situation.[51]

While the detailed interpretation of the 'direct participation' notion may be controversial, the fact remains that this is the criterion that distinguishes civilians whom it is a crime to target from those who are liable lawfully to be attacked. In later sections of this chapter we will therefore apply the criterion to certain new technologies in order to consider the legal issues that arise. We should first, however, discuss specifically the position of contractors' employees in armed conflict, of people involved in non-international armed conflicts, of mercenaries and of those who become involved in the events that lie below 'armed conflict' in the spectrum that we identified in Chap. 2. These are therefore the categories of individual that we will discuss sequentially in the following sub-sections.

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[49] See Schmitt 2010b, p. 38 citing the case of *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).

[50] Yoram Dinstein comments that politicians directly involved in guiding the armed forces, members of a 'war cabinet' and of higher councils sketching or approving military policy or strategy can be targeted, even individually; Dinstein 2010, p. 107.

[51] Quénivet and Shah-Davis 2010, pp. 17–18.

7.2.3 Contractors' Employees and Armed Conflict

We have already noted the concern that duties undertaken by contractors' employees may cause them to take a direct part in the hostilities with the associated consequences. The importance of this danger is increased by the growing numbers of contractors' employees involved in modern deployed operations[52] and by the diverse activities they undertake, some of which are close to the conduct of hostilities.[53] In Iraq, there were civilians employed by companies, some of them major corporations that contracted with the Coalition armed forces, and civilian employees of companies and corporations that provided security and similar services to other companies, institutions and individuals.[54] Usually, contractors' employees will not have combatant status; indeed the financial savings which may have been the purpose in letting the contract[55] will have pre-supposed the civilian status of those undertaking the relevant services. It is the domestic law of the relevant state that will determine the composition of its armed forces and that sets the requirements for membership thereof.[56] Under that domestic law, contractors' employees will generally speaking be civilians and will therefore be entitled to protection from attack "unless and for such time as they take a direct part in the hostilities".[57]

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[52] For a comprehensive and balanced account of the role of private military companies, and for proposals for their regulation, see Chesterman and Lehnardt 2007 and for an authoritative assessment of the development, organization, operation and implications of such companies, see Singer 2003. See also Sassoli et al. 2011, pp. 172–175. It has, for example, been estimated that 20,000 private individuals were involved in contingency contracts for Coalition Forces during Operation Iraqi Freedom; see Security Companies: Shadow Soldiers in Iraq, New York Times, 19 April 2004, available at www.nytimes.com/2004/04/19/world/security-companies-shadow-soldiers-in-iraq.html?pagewanted=all&src=pm.

[53] As Avril McDonald put it, "[l]est it be assumed that these individuals are safely deployed behind the front lines and that the activities they engage in do not involve their direct participation in hostilities, it should be pointed out that, irrespective of the terms of their contracts, some individual contractors are performing essential front line roles in military operations, operating very close to or at the so-called 'tip of the spear'"; McDonald 2007, p. 358. As to the list of activities such individuals perform, a number of which are apparently connected with the conduct of hostilities, see McDonald 2007, pp. 357–358 and consider Ipsen 2013, pp. 107–108.

[54] McDonald 2007, pp. 360–362.

[55] Ipsen 2013, p. 107.

[56] McDonald 2007, pp. 374–381 and Ipsen 2013, p. 88.

[57] As to the ICRC's views on these matters, see ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, pp. 33–35.

An international process was launched by the Government of Switzerland and by the ICRC and has led, on 17 September 2008 to the Montreux Document.[58] At the time of writing 46 states are known to support the Document which contains a compilation of international legal obligations and of best practices associated with the employment of private military and security companies in armed conflict situations. The legal rules and the best practices are divided up into those which apply, respectively, to the states that contract with such companies, to the states on whose territory they operate, to the state where the company is registered or incorporated, to states in general and then address the mutual obligations of the company and its employees. The Document has clear utility in bringing together the law and the identified guidance in a form that should assist states and others to navigate these complex issues correctly.

In November 2010 the International Code of Conduct for Private Security Service Providers was adopted in Geneva. At the time of writing there are 708 signatory companies. The purpose of this initiative is to set out principles that will enable private security service providers to operate in accordance with the law of armed conflict and applicable human rights law standards.[59] The Code articulates among other things standards in respect of the use of force and as to the treatment of persons affected by the activities of such companies.[60]

Under the UK Reserve Forces Act 1996, Part V, provision is made for employees of certain contractors to be called out as sponsored reservists, and thus to become members of the UK armed forces, when military circumstances make this appropriate. This is achieved by means of a triangular set of agreements between the UK Ministry of Defence, the relevant contractors' employee and the contractor. The purpose is to ensure that the services the employee provides in peacetime as a civilian can continue to be provided during periods of tension or armed conflict by the same employee as a reservist member of the armed forces.

If captured by the enemy, called out sponsored reservists will be entitled to combatant immunity for any acts of direct participation in the hostilities that they may have committed and which comply with the law of armed conflict. They will also on capture be entitled to prisoner of war status. By contrast, contractors' employees who are civilians will on capture be liable to trial and punishment for their acts of direct participation in hostilities, including those which comply with the law of armed conflict. They may, however, be entitled to prisoner of war status, for example under Geneva Convention III, Article 4A(4).

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[58] Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict, published by the ICRC and available at www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm viewed on 22 September 2013. For an assessment of the Document, see Cockayne 2008.

[59] Further details as to this initiative are available at www.icoc-psp.org viewed on 22 September 2013.

[60] The Code includes standards of conduct, management and governance and there is now a Charter setting out an oversight mechanism.

Complex liability issues arise from the employment of contractors' employees during deployed operations. To the extent that these issues are addressed by domestic law they lie outside the scope of the present volume.[61]

7.2.4 People Involved in Non-international Armed Conflicts

Common Article 3 refers explicitly to members of the armed forces as participants in the conflicts to which it relates and to 'persons taking no active part in the hostilities'; this latter category of individuals is also referred to in Article 4(1) of APII. The Protocol requires that the wounded, sick and shipwrecked, medical and religious personnel be respected and protected[62] but does not define who does and, respectively, does not come within these classes of individual. A reasonable working assumption would seem to be that the definitions in API of the same terms be given similar meaning in APII, subject to any necessary adjustment due to the differing nature of the conflict.

The civilian population and individual civilians enjoy general protection and may not be made the object of attack.[63] This protection is stated to be conditional on them not taking a direct part in hostilities, a notion that is taken to have a similar meaning to that discussed in Sect. 7.2.2. However, the notion of civilian is not defined in the treaty. The forced movement of civilians, what has recently become known as 'ethnic cleansing', is prohibited.[64]

The NIAC Manual[65] describes 'fighters' as "members of armed forces and dissident armed forces or other organized armed groups, or taking an active or direct part in hostilities".[66] It would seem that some words are missing from the formulation which should, one might assume, refer to civilians who are taking an

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[61] For a discussion of the potential liability of contractors, first as to criminal liability at US law under, respectively, the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act 2000 and the War Crimes Act 1996 and second as to civil liability under US jurisdiction, for example by reference to the Alien Tort Claims Act, see McDonald 2007, pp. 386–392.

[62] APII, Articles 7(1) and 9(1).

[63] APII, Article 13(1) and (2). Provision is made in APII at Article 18 for relief action where the civilian population is suffering undue hardship owing to lack of supplies. As to the general protection of civilians during non-international armed conflicts, see Green 2008, pp. 353–355 and Rogers 2012, pp. 305–309 in which the way in which jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) supports this rule is discussed.

[64] See Rogers 2012, pp. 309–310 where Article 17 of APII and Article 8(2)(e)(viii) of the Rome Statute of the ICC, 1998 are discussed.

[65] The Manual on the Law of Non-International Armed Conflict, International Institute of Humanitarian Law, San Remo, March 2006 (NIAC Manual).

[66] In the Commentary to that paragraph, it is made clear that 'fighters' for the purposes of the Manual refers to armed forces fighting for the Government and to members of organized armed groups fighting against the government; para 1 of Commentary accompanying para 1.1.2.

active or direct part in hostilities.[67] What matters is that the term civilians is defined by the NIAC Manual in negative terms: "Civilians are all those who are not fighters."[68] On this basis, the NIAC Manual bases its articulation of the principle of distinction.[69] The law relating to non-international armed conflict does, however, give some additional protection to particular classes of person.[70]

However, as Tony Rogers points out, guerilla operations characterize many such conflicts, with insurgents operating under the cover of the civilian population or carrying out attacks from civilian crowds. The guerillas avoid distinguishing themselves from the civilian population, will tend to be organized in a cellular structure to impede external penetration and identification of their membership and they tend to limit the use of uniforms to periods when they feel relatively safe doing so, discarding uniforms when on operations. These factors, combined with the use of ambushes, snipers, remotely controlled or suicide bombs and similar tactics, contribute to undermining the effectiveness of the protection that the law of armed conflict can provide in non-international armed conflicts.[71]

7.2.5 Mercenaries

For states that are party to API, mercenaries cannot be classed as combatants and have no prisoner of war status on capture. The treaty defines mercenaries in very restrictive terms. A mercenary is

> any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) is not a member of the armed forces of a Party to the conflict; and

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[67] NIAC Manual, para 1.1.2(a). Note that medical or religious personnel are not regarded as 'fighters'.

[68] NIAC Manual, Para 1.1.3. The result of this is that civilians who directly participate in the hostilities cease to be civilians for the purposes of the Manual and become fighters.

[69] NIAC Manual, Para 1.2.2.

[70] Consider for example, Rome Statute 1998, Article 8(2)(e), sub-paragraphs (ii) personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) personnel involved in humanitarian assistance or peacekeeping missions subject to certain conditions; (iv) places where the sick and wounded are collected; (viii) ordering the displacement of the civilian population; (xi) mutilation and medical or scientific experiments on persons in the power of another party to the conflict.

[71] Rogers 2012, p. 303.

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[72]

The requirements here are cumulative; thus, if any one of them is absent, the person concerned is not a mercenary. However, consideration should be given to the proliferation of companies and major corporations that supply military services to the armed forces. Their employees are generally not members of the armed forces,[73] may well not be nationals of or resident in the territory of a Party to the conflict, and are likely to have been sent to the client state or entity by the employing company, as opposed to by a state. The individual may be undertaking a role which, in accordance with the criteria discussed in Sect. 7.2.2, would arguably amount to direct participation in the hostilities and is, depending on the state or entity being assisted, likely to be paid significantly more than the personnel of equivalent armed forces standing. Whether such persons are mercenaries will, essentially, depend on whether they can properly be regarded as having been 'specially recruited to fight' and on how the term 'motivated by the desire for private gain' is to be interpreted. Yoram Dinstein must be right that the fighting requirement means that experts recruited in a purely advisory capacity should not be classified as mercenaries.[74]

Taking the first issue, it would seem that recruitment for long-term employment with a company that provides services to the armed forces is not special recruitment to fight in a particular armed conflict.[75] However, as Heather Dinniss points out, many contractors essentially find themselves performing military roles and there is the risk that they may be accused of mercenary activity. States must therefore be careful to ensure that contractors are not used improperly and that contracts are suitably drafted to "ensure that in the event that contractors are engaged by the State for tasks which could be construed as direct participation in hostilities, including network defence against incoming attacks, they are not left exposed".[76] Indeed, employing such companies is liable to raise ethical,

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[72] API, Article 47(2).

[73] An exception would be employees of a contracting company who are sponsored reserves as that term is used in the Reserve Forces Act 1996.

[74] Dinstein 2010, p. 58 citing Krawka 1990, pp. 70–71.

[75] Sandoz et al. 1987, para 1805 excludes "volunteers who enter service on a permanent or long-lasting basis in a foreign army"; it is not clear whether, by analogy, a longer-term employment contract with a military company would similarly be regarded as excluding contractors' employees from the mercenary classification. However, Yoram Dinstein interprets this first requirement as meaning that the mercenary must have been "specially recruited for a particular armed conflict", noting that in reality they are often in the pay of well-organized private military companies, providing security services for hire; Dinstein 2010, p. 58.

[76] Dinniss 2013, pp. 266–267 and see Thürer 2011, pp. 252–256. Quite what action would be appropriate for these purposes will depend on the circumstances. See also the discussion at McDonald 2007, pp. 381–382 and Dewi Williams' contention that regulation is a possible answer to the evident difficulty in achieving redress against corporate organisations for wrongdoings by their employees; Williams 2010, pp. 229–236. Consider, however, the Montreux Document, see n. 58 above, discussed at Thürer 2011, pp. 261–263.

accountability and responsibility issues and the employees of such companies are likely to have ambiguous legal status.[77]

As Knut Ipsen accurately observes, the rule regarding mercenaries is not an exception to the general rule as to combatancy but, rather,

> a logical consequence of the law; the person belonging to the armed forces of a party to the conflict […] has the primary status of combatant. It is this assignment to an organ which constitutes authorization to carry out armed acts causing damage. A simple contract between an individual and a party to the conflict – fighting in exchange for payment – is not sufficient.[78]

Leslie Green points out that in many non-international armed conflicts in Africa and in operations following the overthrow of Saddam Hussein in Iraq, both public and private institutions and concerns have employed foreign armed personnel to protect buildings and other facilities and that those arms have been used often with fatal consequences. He notes that no authority, Iraqi or Coalition, seems prepared to condemn these employees as mercenaries, although they take part in the fighting against the insurrectionists and are paid far more than locally recruited troops or other personnel.[79] On the other hand, Dewi Williams is clearly right to observe that Simon Mann "is a rare example of an individual who could fall within the definition of mercenary, contained within Article 47(1)" of API.[80]

For States party to the Mercenaries Convention,[81] the definition of mercenary replicates the API definition except that there is no requirement that the individual actually takes part in the conflict and Article 1(2) provides for additional individuals also to be classed under that Convention as mercenaries.

From a historical perspective, Sarah Percy demonstrates that private fighters were a persistent feature in warfare since the earliest times but largely disappeared from the world stage from the 1860s until the 1960s when they reappeared in a largely recognizable entrepreneurial form. She notes the contention, expressed during debates on the decision to send mercenaries to the Crimea, that such private fighters could not be moral because of their motivation and notes that the UK Government Green Paper following the activities of Sandline in Sierra Leone also expressed concern that inappropriate motivations made mercenaries morally problematic and unable to support the state in the same way as a citizen army. Interestingly, however, Percy speculates that the armies of the late nineteenth and

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[77] Thürer 2011, pp. 256–260.

[78] Ipsen 2013, p. 84.

[79] Green 2008, p. 141.

[80] Williams 2010, p. 227.

[81] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UN General Assembly, 4 December 1989; the Convention has 32 states party. The United Kingdom and United States are not party to the Convention; www.icrc.org viewed on 22 September 2013.

early twentieth centuries may have been an aberration "and that increasing reliance on private force is a return to a more normal state of affairs".[82]

Having considered those who use force in armed conflicts we should, for completeness, consider the legal position of those who use force in situations that fall short of armed conflict.

7.2.6 *Those Who Use Force in Conflicts Other than Armed Conflicts*

The critical thing to understand about circumstances other than armed conflict is also the most obvious—absent a situation of belligerent occupation, the law of armed conflict does not apply. The law that regulates the actions of the protesters, rioters, supporters of the insurrection and, indeed, the actions of the police and security forces in seeking to maintain law and order is the applicable domestic law and human rights law. This in practice means that the criminal law applying in the territory where the relevant events take place will apply, and the normal jurisdictional arrangements will determine in which state criminal proceedings will occur. Put simply, the rioters, protesters, supporters of the insurrection and terrorists are liable to be arrested, tried and punished in accordance with the domestic criminal law for the offences that they commit.

The reference to human rights law signifies that the procedures as to the handling of the disturbances, the arrest, detention, interrogation and general handling of those thought to be involved, any legal procedures against accused persons and so on will have to comply with applicable human rights norms.

The fact that domestic law and human rights law apply to the actions of the security and police forces undertaken in response to the terrorist events, riots, protests and insurrection is significant. That domestic law will likely comprise the criminal law of the relevant territory and the disciplinary code of the security force or police force concerned. If the government responding to these security threats obtains the assistance of a security force from another state, the members of that force will be subject not only to the law of the state in which they are operating, but will also likely be subject to the criminal law of their own state, and to the discipline code of the force to which they belong.

It may be helpful to illustrate the interaction of domestic and human rights law as it applies to the handling by state authorities of a security incident by looking at a practical example. Let us imagine that a rogue civilian aircraft appears to constitute a threat to the UK mainland. Law in the form of domestic UK legislation and applicable human rights law regulates the use of force in such circumstances. The provision of the law of England and Wales that deals with the use of force in

[82] Percy 2011, pp. 273–275.

peacetime to prevent crime and to effect arrests is Section 3 of the Criminal Law Act 1967:

> (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
> (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.[83]

This legal provision is therefore telling us that reasonable force may be used[84] taking into account the relevant circumstances when determining what action is reasonable. Consideration must also be given to the lawful purposes that are provided for in Section 3, namely the prevention of crime or effecting, or assisting in, the lawful apprehension of offenders. Relevant matters to take into account would include:

- How grave the crime is that is to be prevented, the number of individuals at risk of death or serious injury if the crime were to occur and the extent and consequences of the damage that the crime may be expected to cause;
- Whether the force that is planned is likely to prevent the offence or facilitate the arrest of the criminals;
- Whether the planned degree of force is necessary to achieve those goals;
- Whether there is a threat to the security forces themselves;
- How much time is available for considering the available options.

This domestic law on the matter must however be read in conjunction with human rights law, which for the UK in such a context means the right to life as reflected in Article 2 of the European Convention on Human Rights.[85] Article 2(1) asserts: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …." Article 2(2)(a) then provides that "deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a. in the defence of any person from unlawful violence…". It is clear from decided cases before the European Court of Human Rights that the lawfulness of any action of this sort will importantly depend on careful planning, on making a cautious assessment of the proportionality of the planned action in the circumstances and on carefully considering its foreseeable consequences. The use of force must be

[83] Section 3, Criminal Law Act 1967 c. 58.

[84] See Section 76 of the Criminal Justice and Immigration Act 2008 under which the reasonableness of the degree of force used must be decided by reference to the circumstances as the accused person believed them to be, even if that belief was mistaken, but the force used must be proportionate. If the person using force only does what he honestly and instinctively thinks necessary for a legitimate purpose, that suggests that the force used is reasonable.

[85] Incorporated into English domestic law by virtue of the Human Rights Act 1998.

strictly proportionate to the accomplishment of the self-defence objective.[86] If the use of force is not planned or is disproportionate to the circumstances, it is highly likely to be considered unlawful.

Applying these principles to our rogue civil aircraft example, it will be important for the relevant authorities to be able to show that contingency planning in advance of such an event was undertaken. Such additional planning as the timelines of the event permitted must also be done. When formulating the contingency plan, the minimum and proportionate but effective degree and type of required force will be considered by reference to different scenarios so that the force used can be shown to have been planned and controlled. Much will depend on what information can be gleaned as to the intentions of those who have control of the aircraft, the nature and size of the area liable to be affected by indicated misuse of the aircraft, the expected number of casualties resulting from such misuse and other matters. Showing, however, that the responses to foreseeable scenarios were considered and planned in advance and that the action taken was a reasonable response to the situation as it appeared to the decision maker will be critical factors in determining whether human rights obligations have been met in the circumstances. If:

- he implements a properly thought-through and relevant contingency plan,
- carefully considers all available information,
- takes all practicable steps in the limited time available to clarify the intent of those in control of the aircraft,
- comes to the conclusion that attacking the aircraft is absolutely necessary and strictly proportionate, and
- the attack is undertaken, to the extent that time and circumstances permit, in such a way as to minimise civilian death and injury,
- the decision maker will not have acted unlawfully in deciding to authorise the attack.

These are the criteria that will determine the lawfulness under domestic law of action taken by the security forces in the circumstances we have been discussing. The principles disclosed apply equally to dealing with other kinds of internal security situation in which lethal force becomes necessary. If excessive force is used or if force is used unnecessarily the Section 3 Criminal Law Act 1967 defence will not apply and the members of the security forces concerned will be liable to prosecution if criminal offences are disclosed.

Having considered those who are involved in using violence whether during armed conflict or in peacetime, we should now spend a short time considering those who may be affected by attacks and whom the law seeks to protect.

[86] See *McCann v. UK* (1995); 21 EHRR 97 at para 212; *Isayeva, Yusupova and Bazayeva v. Russia*, 41 EHRR 847 (2005) at paras 190, 191 and 200.

7.3 Persons Whom the Law Would Protect in Armed Conflict

In this relatively short section it is only necessary to summarise the numerous classes of person who are protected by the law of armed conflict. The purpose in doing so is to set some sort of context to the later discussion of how new technologies and kinds of conflict will fit into this part of the legal framework.

7.3.1 Protected Persons Under the Law of Armed Conflict: Civilians

Civilians are defined in negative terms for the purposes of targeting law. Thus "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6)" of Geneva Convention III. The concept therefore excludes members of armed forces, members of militias, volunteer corps and organized resistance groups belonging to one of the parties to the conflict and who meet specified conditions, members of regular armed forces who profess allegiance to a government not recognized by the detaining power and members of a *levee en masse*. So civilians are all persons who are not belligerents.[87] Civilians benefit from the general application of the principle of distinction[88] and from the associated prohibition of indiscriminate attacks.[89] They also benefit from the

[87] API, Article 50(1) and Corn et al. 2012, p. 283.

[88] Article 48 of API obliges Parties to the conflict at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives. Article 57(1) requires that in the conduct of military operations constant care be taken to spare the civilian population, civilians and civilian objects. There are then specific protections of civilians in Article 51.

[89] Article 51(4) of API prohibits indiscriminate attacks which it describes as "(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol, and, consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction." In Article 51(5) the treaty gives two examples of types of attack that are to be considered indiscriminate, namely "(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

general protection of civilian objects.[90] Accordingly they may not be made the object of attack and must be protected against the effects of military operations. Planners and those who decide upon attacks must do everything practically possible to verify that civilians are not the object of attack and that the attack is not otherwise unlawful, for example because it would be indiscriminate.[91] They must do everything possible when choosing weapons and methods of attack to avoid or minimize civilian injury and loss[92]; they must not decide on an attack which would breach the proportionality rule and must cancel or suspend the attack if it becomes apparent that it would breach that rule or that the target is e.g. civilians or a civilian object.[93] Moreover, effective advance warning must be given of attacks which may cause civilian death or injury unless the circumstances do not permit this.[94] Finally, if there is a choice of targets for obtaining a like military advantage, attackers are required to choose the target that may be expected to cause the least danger to civilians and civilian objects.[95]

These, then, are the precautions that attackers are required to undertake in order to seek to ensure the effective protection of civilians in armed conflict.

The parties are also, however, required to take precautions against the effects of attacks. These are spelt out in Article 58 of API. They must to the maximum extent feasible: try to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives,[96] avoid locating military objectives within or near densely populated areas[97]; and take other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers arising from military operations.[98]

This combination, then, of precautions in attack and against the effects of attack is the approach that the law employs to seek to secure appropriate protection of civilians in armed conflict. It must, however, be emphasized that an attack that causes civilian loss of life or injury is not as a result rendered unlawful. It is only if the attack deliberately targets civilians or is indiscriminate, or if the required precautions by either party to the conflict are not taken, that the law will have been broken.

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[90] Civilian objects are all objects that are not military objectives; API, Article 52(1). Military objectives are defined at API, Article 52(2) as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

[91] API, Article 57(2)(a)(i).

[92] API, Article 57(2)(a)(ii).

[93] API, Article 57(2)(a)(iii) and 57(2)(b).

[94] API, Article 57(2)(c).

[95] API, Article 57(3).

[96] API, Article 58(a).

[97] API, Article 58(b).

[98] API, Article 58(c).

7.3.2 *Persons Specifically Protected Under the Law of Armed Conflict*

Certain other classes of person have specific protection under the law of armed conflict. By this is meant that these classes of person benefit from protective arrangements that are specific to them. In the following list, we shall refer to some such classes of individual, again as an illustration on which to base the ensuing discussion of modern and future means and methods of warfare.

The following protections apply to all international armed conflicts and derive from the Geneva Conventions 1949, treaties which have been ratified by, and thus bind, all States.

Members of the armed forces and certain other individuals who are wounded and sick must be respected and protected.[99] If the same classes of individual are at sea and wounded, sick or shipwrecked (including forced to land at sea in an aircraft) they must also be respected and protected.[100]

Medical personnel exclusively engaged in searching for, collecting or transporting the wounded and sick or in preventing disease, staff exclusively engaged in administering medical units and establishments and chaplains attached to the armed forces must always be respected and protected.[101]

Members of the armed forces specially trained should the need arise for employment "as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick" must also be respected and protected if carrying out these duties when they come into contact with the enemy or when they fall into his hands.[102]

Religious, medical and hospital personnel of hospital ships and their crews must be respected and protected.[103]

Prisoners of war, who are defined in Article 4 of Geneva Convention III, are entitled to the general protection set out in Articles 12–16 of that Convention and to the additional protections set forth in its other articles. API requires that a person

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[99] Geneva Convention I, Article 12(1). The other individuals referred to here comprise those referred to in Article 13. Article 12 requires that all such wounded and sick must be treated humanely and cared for on a non-discriminatory basis by the party in whose power they are. The article spells out specific protections for the wounded and sick.

[100] Geneva Convention II, Articles 12 and 13. Article 12 provides similar safeguards to those in Article 12 of Geneva Convention I.

[101] Geneva Convention I, Article 24. Staff of National Red Cross and of voluntary aid societies that are duly recognized and authorized by their governments and that are employed on the same duties are placed in the same position if they are subject to military laws and regulations; Article 26(1). On capture, persons covered by Article 24 or 26(1) have the status of retained personnel under Article 28.

[102] Geneva Convention I, Article 25. On capture, such persons are prisoners of war to whom Article 29 applies.

[103] Geneva Convention II, Article 36. They may not be captured while in the service of the hospital ship irrespective whether there are wounded and sick on board.

who takes part in hostilities and who falls into the power of an adverse party shall be presumed to be a prisoner of war if he claims that status or appears to be entitled to it or if the Party on which he depends claims it on his behalf.[104]

Civilians who, in case of conflict or occupation, find themselves in the hands of a Party to the conflict or Occupying Power of which they are not nationals are protected as provided for in Geneva Convention IV.[105]

The populations of the countries involved in the armed conflict are protected by the provisions of Articles 13–26 of Geneva Convention IV.[106]

Other provisions of the law of armed conflict have the effect of conferring specific protections on particular classes of person as follows:

Personnel engaged in the protection of cultural property must, to the extent consistent with security, be respected and if they fall into the hands of the opposing Party to an international armed conflict, they must be allowed to continue to carry our their duties if the cultural property for which they are responsible has also fallen into the hands of the opposing Party.[107]

For states that are party to API, the protections mentioned above are broadened and additional categories of personnel are given specific protection. So, for example, the definitions of 'wounded and sick' and of 'shipwrecked' are extended.[108] Medical personnel,[109] religious personnel[110] and civil defence

[104] In case of doubt as to his status, he retains the status of prisoner of war until the doubt is resolved by a competent tribunal; API Article 45(1) and Geneva Convention III, Article 5(2).

[105] Geneva Convention IV, Article 4(1). This does not apply to nationals of neutral or co-belligerent states that retain diplomatic relations with the state in whose hands the person is; Geneva Convention IV, Article 4(2). Consider the finding of the ICTY Appeals Chamber that the nationality criterion now rests on allegiance and effective protection; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras 164–166; see also ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para 266. For a discussion of the protection of civilians under Geneva Convention IV, see Corn et al. 2012, pp. 294–301.

[106] Geneva Convention IV, Article 13.

[107] Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, Article 15.

[108] API, Article 8(a) and (b). 'Wounded and sick' include maternity cases and newborn babies. The 'shipwrecked' include military and civilian persons provided they refrain from acts of hostility.

[109] Medical personnel are persons assigned whether permanently or temporarily by a Party to the conflict exclusively to the search for, collection, transportation, diagnosis or treatment including first aid treatment of the wounded, sick and shipwrecked, for the prevention of disease, the administration of medical units, or the operation or administration of medical transports; API, Article 8(c) and (e). They may be military or civilian and may include medical personnel of national Red Cross or Red Crescent or voluntary aid Societies recognized and authorized by a party to the conflict.

[110] Religious personnel may be military or civilian, must be exclusively engaged in the work of their ministry and attached to the armed forces of a Party to the conflict, to the medical units, transports or civil defence organisations of such a Party or certain other medical units or civil defence organisations; API, Article 8(d).

personnel[111] are all given specific protection by API; the treaty makes particular provision as to respect and protection for wounded, sick and shipwrecked,[112] civilian medical and religious personnel[113] and protects the undertaking of medical duties.[114]

A person who is, or who in the circumstances should be recognized as being *hors de combat,* may not be made the object of attack.[115]

As has already been made clear, the categories of individual discussed in this section do not represent a comprehensive list of classes of individual who receive specific protection in the law of armed conflict.[116] They do however represent a sufficiently representative sample to inform the following discussion.

7.3.3 Protected Persons Under Domestic and Human Rights Law

The interaction between the law of armed conflict and human rights law is discussed fully in Chaps. 9 and 10. It is not necessary to repeat that discussion here. The simple point of relevance to the current discussion, however, is that all persons within the jurisdiction of a state party to a human rights instrument are protected by the right to life as reflected in that instrument.

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[111] Personnel of civil defence organisations and civilians who, though not members of such organisations, nevertheless respond to an appeal by the relevant authorities and perform civil defence tasks, as defined in Article 61(a), are to be respected and protected in accordance with Articles 61(c) and 62. See also Article 67 as to members of the armed forces assigned to civil defence organisations.

[112] API, Article 10.

[113] API, Article 15.

[114] API, Article 16.

[115] API, Article 41(1). A person is *hors de combat* if he is in the power of an adverse party, clearly expresses his intention to surrender or has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself, provided, in any of these cases, that he abstains from any hostile act and does not attempt to escape; API, Article 41(2).

[116] Consider for example the provisions as to the protection of women and children in API Articles 76–78. These are important provisions because of the increasing dangers that women and children face in modern armed conflicts. For a discussion of these and related issues, see Quénivet and Shah-Davis 2010, pp. 20–22.

7.4 Implications of Changes in the Nature of Conflict for the People Involved

Now that we have considered the classification of the various types of participants in the different kinds of conflict, we should now look at some of the changes that are taking place in the involvement of human beings in conflict and ask what implications those changes have.

7.4.1 Civilianisation of the Battlespace

There is an increasing trend for the civilianization of the sorts of activity that were previously undertaken by military personnel. The fiscal challenges being faced by numerous countries stimulate the search for cheaper ways of undertaking and supporting military activities. Capitation rates for civilian personnel are frequently lower than those of comparable armed forces members and placing whole categories of activity out to contract may result in even greater financial and manpower savings.[117] Accordingly logistic support, IT support, security of military facilities, the processing of intelligence data, the servicing and repair of military equipment, the preparation of military platforms and even air to air refueling are among numerous tasks that are increasingly being undertaken by civilian personnel. If the task has been put out to contract, the persons giving instructions associated with those tasks will also, likely, be more senior, civilian employees of the contracting company.

There are, therefore, already tasks in civilian hands that, if undertaken during an armed conflict, may be regarded by some observers as amounting to direct participation in hostilities. Causing civilians to undertake particular tasks that amount to direct participation will not render those activities protected from attack. It will merely mean that the enemy can lawfully attack the relevant civilians while they are fulfilling those tasks. As we saw in Sect. 7.2.2, it is not a breach of the law of armed conflict for a civilian to participate directly in hostilities during an armed conflict. Such participation does, however, deprive the civilian of his protected status, renders him liable to attack while such participation persists and the civilian is liable to criminal sanctions for any criminal acts that his participation involves—he has no combatant status nor immunity.

Some states, as we have noted, address this issue by giving key contractors' employees reserve forces status such that they can be called up as members of the armed forces, should the need arise, to perform their contractual tasks during armed conflict.[118] This sort of approach has the result that the relevant employees will remain in their established posts during armed conflict and that they will have

[117] For a discussion of the factors that are driving outsourcing by the armed forces, see McDonald 2007, pp. 370–372.

[118] Reserve Forces Act 1996, 1996 c. 14, Part V.

combatant immunity while the armed conflict endures. Absent such arrangements, it would seem to be incumbent upon states that are contracting with companies for services that amount to direct participation to take proper steps to ensure that the employees providing those services are properly briefed on the potential legal consequences of doing so. In practical terms, the relationship between the state and the contractors' employee is an indirect one, so the state is likely to be ill-placed to undertake the briefing itself. The proper course, in ethical if not in legal terms, would therefore be for the contracting state to take feasible steps to ensure that suitable briefings are given.

As Marco Sassoli, Antoine Bouvier and Anne Quintin point out,

> if everyone who is not a (lawful) combatant is a civilian, in many asymmetric conflicts the enemy consists exclusively of civilians. Even if, in non-international armed conflicts, members of an armed group with a fighting function are not to be considered as civilians, it is in practice very difficult to distinguish them from the civilian population. Furthermore, private military and security companies whose members are usually not combatants, are increasingly present in conflict areas.[119]

7.4.2 Civilians and Military Cyber Operations

However, the civilianization of the battlespace is not only due to civilians taking the place of military personnel in established functions. The changes in the nature of conflict that we are discussing in other chapters have implications for the personnel involved and in the next few paragraphs we shall consider how this is so. Take for example the case of military cyber operations. There can be no doubt that the factories and associated facilities that supply military units and headquarters with computer hardware and software and that repair military computers render themselves by these activities military objectives in their own right.[120] The workers in the computer factory, by analogy to the munition factory workers referred to in Sect. 7.2.2,[121] will not be directly participating in hostilities merely by working in such a factory. However, workers who are employed to repair military computers may be regarded by some commentators as being on the borderline of direct participation, while a civilian who is employed to feed

[119] Sassoli et al. 2011, pp. 163–164. Those authors note this issue, the targeting of civilians in 'ethnic cleansing' operations, the tendency to attack defenceless civilians if the fighter's aim is to earn a living by looting etc. and the accomplishment of regime change by pressurizing the civilian population rather than by securing battlefield victory as all challenging the principle of distinction; Sassoli et al. 2011, p. 164.

[120] For the definition of 'military objective', see n. 90 above. In the modern digital age, the supply of computing capacity to military units and headquarters clearly contributes to military action, both conventional military action and military cyber operations, with the result that destroying the relevant factories, the associated storage warehouses, the supply depots and/or the servicing and repair facilities will offer a definite military advantage.

[121] See n. 32 above.

targeting data into computers as part of the preparation of a planned mission in which a missile is guided to a target represented by that data will certainly be participating directly in that attack.

Civilians who are employed during armed conflict to develop cyber attack software that is being designed for use in a particular attack are likely to be regarded as directly participating in the resulting cyber attack. This is so because the process of developing a cyber weapon seems to be analogous to the example of the construction of IEDs discussed in Sect. 7.2.2,[122] partly at least due to the fact that cyber weapons are liable to be designed with a specific attack against a known and particular military objective in mind. The cyber weapon will have to be so fashioned that it can reach the node, link or network of interest and so that it can interact with that node, link or network in a specified manner. It may have to mask or conceal what is going on from those whose task it is to monitor the correct performance of the targeted computer system or of the facility that it supports. All those involved in developing the cyber tool for that cyber attack or operation are likely to be integral to its use in a cyber operation, so the computer engineers who develop the weapon are likely to be regarded as directly participating in the relevant attack.

If those engineers are regularly or persistently involved in such work during an armed conflict, it follows that they are likely to lose their protection as civilians throughout the period of such involvement with the result that not only can the facility where they work be made the object of attack but so also can they be attacked personally at any time during the period of such direct participation, whether they happen to be at work, at home, on the way to work or elsewhere.[123] If the cyber operation in which they are involved causes damage, injury or death, they are liable to criminal proceedings, conviction and punishment for the crimes disclosed, irrespective of whether the attack complied with the law of armed conflict. Interestingly, military personnel involved as part of the same team in the same attack would enjoy combatant immunity from prosecution.

Civilian involvement in cyber operations is likely to be considerable. This is for a number of reasons. Much IT expertise is concentrated in civilian hands, and in the hands of civilian companies and their research departments. Computer and communications technologies are exploited commercially on a huge scale, yielding vast revenues for the corporations involved and the fierce competitive drive associated with global research and development in the field makes it inevitable that in the civilian sector there will be rapid progress in the development of such technologies.

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[122] See n. 32 above.

[123] The discrimination rule in Article 51(4) of API, the proportionality rule in Article 51(5) of API and the precautions in attack prescribed by Article 57 of API would all have to be complied with.

There is also a disproportionate concentration of IT expertise among the young, even among those below the minimum age for military service.[124] Furthermore, during peacetime, state communications security facilities, which may employ civilian staff, undertake relevant cyber activities and may thus develop national capacity in this field in civilian rather than military hands. It is the civilian status of the direct participants that is crucial; their status as employees of defence contractors does not per se entitle direct participants to any combatant status under the law of armed conflict.

Civilian involvement in cyber operations may, however, be hard to classify. As Eric Jensen observes, individual civilians and their computer systems will be vital though unwitting elements in attacks while hacktivists, such as Anonymous members, will participate "along a spectrum of activity". He identifies writers of harmful code, attack co-ordinators, those who by failing to switch their computers off enable the runners of the malware to slave them to nefarious use, and the difficulty states will have in determining how to respond to the differing activities and individuals who thus become involved.[125]

It would seem prudent for states to retain a core expertise in military hands so that during international armed conflicts military cyber operations can be undertaken by personnel with combatant immunity.[126] Where direct participation by civilians is unavoidable, the civilians may need to be informed of the additional risks (with the implicit risk that they will decline to do so and will therefore choose to leave their employment), and appropriate mitigation arrangements should be considered.

In non-international armed conflicts, there is no combatant immunity so immunity from prosecution does not arise. However, direct participation in non-international armed conflict hostilities will, nevertheless, render the civilian liable to be attacked in compliance with international law, and that is a factor that should also be borne in mind by those involved.[127]

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[124] See Tallinn Manual, Rule 78: "It is prohibited to conscript or enlist children into the armed forces or to allow them to take part in cyber hostilities." See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, Articles 1 and 2; API, Article 77(2); APII, Article 4(3); and Dinniss 2013, pp. 267–268.

[125] Jensen 2013, p. 18–19.

[126] The combatant requirement of responsible command seeks to limit participation in war by rogue actors and enables unlawful activity to be traced to responsible leaders, thus providing a potential basis for claims to reparations; Watts 2009, p. 391 at p. 437. As Heather Dinniss observes, "there is no reason in principle that armed groups who are structured as a network should be excluded from legitimate combatant status if they are able to maintain discipline, carry out concerted military operations, and meet the other requirements of combatant status"; "if the group does not have sufficient organization, whether in network or hierarchical form, to maintain discipline and supervision, its members cannot be lawful combatants"; Dinniss 2013, p. 260.

[127] APII, Article 13(3).

7.4.3 Civilians and Remotely Piloted and Autonomous Attack

The increasing emphasis on unmanned platforms for undertaking reconnaissance, attack and other military tasks has implications for the personnel involved. Personnel who are combatants may be performing their duties at a considerable distance from the place where the reconnaissance mission is to be undertaken or where the attack is to occur. Nevertheless, Article 44(3) of API will, for states that are party thereto, require that combatants must "distinguish themselves from the civilian population while they are engaged in an attack or in the military operation preparatory to an attack".[128] Let us therefore consider the two kinds of attack referred to in the heading to this section.

In the case of an attack using a remotely piloted platform, Article 44(3) makes it clear that a military controller of the platform must be in uniform when undertaking the attack. Some readers may think this unnecessary in the case, for example, of a controller located in a different continent to that in which the attack is to occur. However, it must be recalled that the individual who is piloting the platform remotely is liable himself to be made the object of lawful attack by the opposing party to the conflict and that the control equipment that he is using and the structure or location where it is to be found will be military objectives and thus also liable to lawful attack. It is therefore logical that the combatant be required to distinguish himself as required in Article 44(3).[129]

If a civilian controls a remotely piloted platform on an attack mission, such activity will be classed as direct participation in the hostilities and will therefore

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[128] See the discussion in Ipsen 2013, pp. 89–90 and for a critical assessment of the meaning and effect of Article 44(3) of API see Dinstein 2010, pp. 51–55 and Solis 2011, pp. 125–129 where the irony is noted that Article 44(3) allows the feigning of civilian non-combatant status, while Article 37 of API prohibits perfidy of which feigning civilian, non-combatant status is cited as a specific example. This incompatibility, Gary Solis believes, "illustrates the compromises that the drafters felt necessary to incorporate, hoping to induce liberation movements to recognize and conform to LOAC"; Solis 2011, p. 129. Frits Kalshoven and Liesbeth Zegveld also see the rules and exceptions in Article 44 as a compromise which in their view goes a long way to meeting the interests of competing interests although they comment that in the time since adoption of API "implementation of the new rules in situations of actual hostilities has not made any progress"; Kalshoven and Zegveld 2011, p. 90. Hays Parks also regards Article 44(3) as an unrealistic interpretation of the law of war as it applies to personnel, contending that a civilian should be targetable if his immunity from military service is because his continued service in his civilian position is of greater value to his nation's war effort than his service in the military would be; Hays Parks 1990, pp. 134–135. Note the US objection that Articles 43(1) and 44(3) enable members of irregular armed groups to hide themselves among the civilian population; Corn et al. 2012, p. 142. Tony Rogers argues that the idea that civilians should have a quasi-combatant status depending on what job they do takes little account of the confusion that would be caused; Rogers 2012, p. 13.

[129] Article 44(3) goes on to refer to "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself". The circumstances discussed in this section are not such a situation.

cause the civilian to lose his protected status as described elsewhere in this chapter.[130]

The more interesting question concerns persons who are involved in autonomous attack missions. Such involvement may take a variety of forms. Personnel will be involved in planning the mission, in pre-sortie servicing of the platform, in loading the platform with mission essential data, fuel, and ordnance, in moving the platform to the place from which it deploys or is launched, in developing the software that the platform uses for navigation and target recognition and in feeding into the platform the characteristics of the target for which it is to search and the area where it is to search. The commanders on whose authority the mission is undertaken should also be considered here. This may not be a comprehensive list, but illustrates the breadth of human involvement in an unmanned autonomous mission. As we saw earlier in this section, combatants are obliged by Article 44(3) of API to distinguish themselves while they are engaged in military operations preparatory to an attack. Combatants will normally wear uniform at all times when they are on duty during an armed conflict and in some conflicts on a permanent basis.[131] Nevertheless, in relation to autonomous missions states must take a view as to which activities amount to preparation for an attack and must ensure that combatants are in uniform when undertaking them. Preparatory military operations would certainly include loading ordnance and mission essential data including data as to the target for which it is to search and launching or deploying the platform. There is of course a distinction between activities that constitute preparation for the autonomous mission and activities that are preparation for an attack. Article 44(3) is concerned with the latter.

Many of the activities listed earlier in the previous paragraph would seem, however, to constitute direct participation in the autonomous hostilities. Software development may not be direct participation, particularly if the software is capable of application to attacks in general as opposed to being specifically developed with a particular attack in mind. Similarly, it will be a matter of judgment whether those involved in servicing the platform are directly participating while doing so. To the extent that their activity is not undertaken with a particular mission in mind, they are not directly participating in a particular act of hostilities but, rather, are maintaining the general serviceability of the relevant platforms and thus are generating a general capacity to undertake hostilities; in short, their involvement is analogous to that of the munitions factory worker. Personnel who give orders or instructions for the undertaking of autonomous attack missions are directly participating in the resulting hostilities and all those who are directly participating in hostilities should be combatants in uniform.

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[130] See the discussion of CIA remotely piloted operations in Pakistan, Yemen, Somalia, Afghanistan and Iraq in Targeting Operations with Drone Technology: Humanitarian Law Implications, Background Note for the American Society of International Law Annual Meeting, 25 March 2011, pp. 25–37.

[131] Sandoz et al. 1987, para 1692.

7.4.4 Hostilities in Outer Space

Many of the issues that have been discussed in the previous two Sections will also apply to hostilities in outer space. The combatants involved in undertaking attacks in outer space must be in uniform while so engaged.[132] A wide selection of activities will contribute to the prosecution of such attacks and the criteria discussed above will determine which of these amount to preparation for an attack within the meaning of Article 44(3). Numerous activities will amount to direct participation in the associated hostilities and will have the consequences explained earlier in this chapter for any civilians who are undertaking them.

To the extent that activities in outer space in peacetime are in the hands of civilian undertakings and agencies, there may be a challenge in ensuring that during armed conflict combatant personnel are available, trained and ready to 'step into the civilians' shoes', as it were.[133] A potential solution may be an adapted form of the UK notion of 'sponsored reserves', discussed in Sect. 7.2.3. Alternative solutions might involve the performance of such activities by members of the armed forces in peacetime as well as in armed conflict or allowing civilians to perform them in periods of armed conflict on the basis that all involved appreciate the loss of protected status that will be the result.

7.5 Implications for Individuals of Changes to the Legal Spectrum of Conflict

If, as is improbable, the distinctions between non-international armed conflicts to which APII does and, respectively, does not apply erode such as effectively to produce a single categorization of non-international armed conflicts, this would not appear likely to have significant consequences for the legal status of the individuals involved. As is currently the case, no participants in such conflicts would have combatant status and there is, as we saw in Chap. 2, no prospect of a change in that situation in the foreseeable future. Civilians will retain protection under that body of law for such time as they refrain from direct participation in the hostilities, and in a somewhat circular way, civilians will of necessity continue to be regarded as those who do not become involved in the fight.

Clearly, if the nations were to adopt more detailed treaty provision as to non-international armed conflict, which would be a most desirable development, the status of people who participate in or are affected by such hostilities would be one of many topics for the enhanced treaty provision to address.

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[132] API, Article 44(3) and see the discussion in the previous section.

[133] This is also likely to be a considerable challenge where cyber activities that in peacetime are undertaken by, e.g. civilian employees of national communications security agencies, need to be continued in periods of armed conflict.

The distinction in legal provision between international and non-international armed conflicts seems likely to persist, and a major reason for that is the unwillingness of states to give combatant status to rebels involved in the latter. The current distinction between non-international armed conflicts and domestic security situations falling short of armed conflict also seems likely to remain. The use of force by non-state actors in such domestic security situations will continue to be treated as criminal activity and will therefore usually[134] remain a matter for the relevant police forces and for the criminal courts. Acts undertaken to cause terror as part of a domestic security situation will remain crimes subject to national jurisdiction and the status of terrorists as criminals will not be affected by references to a so-called 'war on terror'.

7.6 Conclusion

So what does all of this tell us about the legal status that people will have during conflicts in the rest of the twenty-first century? Well, anyone who thinks that when diplomacy fails the military will necessarily form up in lines of battle and contest the issue to the bitter end in an exclusively military environment has clearly not been observing current developments in which the use of what many would agree is military-looking force vitally requires the involvement of civilians in order to make the technologies work and in which other civilian involvement in hostilities has also been becoming increasingly widespread. Appreciating the implications for such civilians of their direct participation in hostilities in an international armed conflict, we have seen that some states like the UK put some relevant activities out to contract on a sponsored reserve basis. Is such an approach a commendable way of preserving the bright line distinction between combatants and civilians, or is it a fig leaf, a way of air-brushing what are essentially civilians into uniform for a perhaps narrowly defined period, in other words is it a device that tends to circumvent the underlying philosophical distinction?

The better view is that there is no device at work here and that the sponsored reserves mechanism is a proper way of maintaining the combatant/civilian distinction in challenging modern circumstances, an approach that other states might profitably consider.

The notion of combatants, with their continuous liability to be lawfully attacked and their associated immunity in relation to lawful hostile acts, continues to make sense in modern armed conflict. The imbalance between that continuous liability to be lawfully attacked and the requirement, suggested by the ICRC, that a member of an organized armed group is only continuously targetable if he has a continuous

[134] There will continue to be occasions when the state's armed forces are deployed to assist the civil authorities without the resulting situation being regarded as a non-international armed conflict.

combat function is no justification for doing away with combatant status and continuous targetability for members of the armed forces.[135] Rather, the imbalance shows that the suggested continuous combat function requirement would be too restrictive and that other circumstances, of the sort discussed earlier in this chapter, ought also to render relevant individuals continuously targetable.

Furthermore, and notwithstanding the difficulty in reaching a consensus as to its interpretation, the notion of direct participation in hostilities seems to be appropriate to modern circumstances. Its roots lie in the vitally important and intransgressible principle of distinction. Irrespective of the technical developments that we see in the conduct of warfare and however the legal spectrum of conflict may be adjusted or may evolve, the principle of distinction will remain the critical foundation of the law of armed conflict and future developments must adjust to its requirements rather than the other way round.

Merging Common Article 3 conflicts with those to which APII applies seems to have no implications for the status of those involved. To revoke API Article 1(4) would cause armed conflicts to which that paragraph would otherwise relate to become non-international armed conflicts with the result that no person involved in such a conflict would have combatant status, and the 'peoples' involved in the fighting would therefore be liable to prosecution and punishment for their violent acts in the same way as those fighting against the government in any other non-international armed conflict.

One remaining issue is worthy of discussion. It is whether the distinction, inherent in the notion of direct participation in hostilities, between 'direct' and 'indirect' participation makes sense in the context of the new technologies discussed in this chapter. As the Interpretive Guidance notes, the distinction is essentially between involvement in the hostilities and taking part in the general war effort or in war-sustaining activities.[136] The question to ask is whether this is a proper basis for such a distinction in the context of modern methods of warfare; in other words does the notion of the innocent civilian make sense in twenty-first century warfare?

The worry is that the distinctions referred to in the previous paragraph become rather fine in the context of cyber warfare and of operations involving remotely piloted and autonomous platforms. Nevertheless, the distinctions outlined in the present chapter do make sense in both traditional, modern and developing methods

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[135] I.e. members of the armed forces who are not medical or religious personnel as defined in API.

[136] The Interpretive Guidance describes the general war effort as including "all activities objectively contributing to the military defeat of the adversary" and examples cited are design, production and shipment of weapons and military equipment and construction or repair of infrastructure outside the context of concrete military operations. War-sustaining activities would also, according to the Interpretive Guidance, not amount to direct participation, and these would include political, economic or media activities supporting the general war effort such as propaganda, financial transactions and production of agricultural or other non-military industrial goods; Interpretive Guidance, p. 51.

of warfare, and fine though some of the differences may be, they nevertheless point to a legitimate basis for differentiating between those who should be liable to be attacked as being part of the hostilities and those who should not because they are not involved in the fight.

Thus, a team of cyber specialists may one day be developing a generic cyber tool capable of a number of different applications and which is not specifically being prepared for a particular, planned attack. That would clearly equate with the munitions factory workers supporting the general war effort rather than with direct participants in hostilities. Such individuals would therefore not be liable to be made the object of attack. Contrast the same team who, on the following day, may be creating a particular piece of malware designed for use in a known attack on a pre-determined target network. This time the team's actions are within the context of concrete military operations in the sense that their actions are integral to the cyber attack with the result that they can properly be regarded as directly participating in that attack operation.

In remotely piloted attack operations, the differences that will cause one activity to be regarded as direct participation and another to be deemed part of the general war effort, or as war sustaining, may also be quite fine. Thus, the transportation of an unmanned platform from the factory where it was produced to the military base from which it will operate would not, in the author's view, amount to direct participation. The flying of that platform from the operational base located on one continent a distance of, say, 1500 miles towards the area of operations with a view to its immediate operational use as part of the same sortie would be direct participation by the operator controlling it because it constitutes preparation for an act of direct participation and therefore is direct participation in its own right. Some experts may disagree, taking the view that the operator in that example is not directly participating because the threshold of harm and direct causation constituent elements are lacking. However, the better view seems to be that the operator is taking a direct part in the ensuing hostilities because what he is doing constitutes preparation for his or another's act of participation.

In short, while the advent of modern technologies poses some challenges, the distinction between what is and what is not participation in the hostilities continues to make sense. Applying the relevant criteria may not always produce convenient conclusions, but that does not per se make them any less valid.

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Chapter 8
Detention Operations: Legal Safeguards for Internees

Contents

8.1 Introduction

It is only proper to start this chapter by recalling the disgraceful behaviour by British armed forces personnel, mostly members of the Queen's Lancashire Regiment, in Iraq during the period from 14 to 16 September 2003 that caused the death of a detainee in Iraq by the name of Baha Mousa and significant suffering by other detainees who were also present. A public inquiry investigated the circumstances and the comprehensive inquiry report sets out numerous recommendations.[1] Emerging evidence also suggests that there were other incidents of such mistreatment.[2]

[1] The Report, dated 8 September 2011 is available at www.bahamousainquiry.org.
[2] See for example Cobain 2013, available at www.guardian.co.uk/world/2013/jan/29/iraqi-detainees-demand-uk-inquiry.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_8,

Current UK doctrine on the handling of captured personnel has been revised in the light of the Inquiry's recommendations.[3]

Certain things should be made clear at the outset. First, behaviour by British armed forces personnel of the sort disclosed in the Inquiry Report is absolutely exceptional and reports of such events will have distressed the overwhelming majority of British service personnel. Second, many of the acts of the service personnel in whose custody these detainees were from 14 to 16 September 2003 constitute breaches of the criminal law, breaches of the law of armed conflict, breaches of human rights law and breaches of the applicable armed forces disciplinary code which, for the bulk of those involved, will have been the Army Act 1955. By any reckoning, and as all right thinking people would agree, the mistreatment of prisoners, whether in times of armed conflict or otherwise, is a serious criminal act, potentially indicative of a grave failure of discipline and deserving, when proved, of exemplary punishment.

It is, however, fair to note that other states have experienced similarly unacceptable episodes of prisoner mistreatment,[4] but perhaps the feature that marks out the more enlightened of military forces, such as those from the UK, is their reactions when things go wrong in this way. Far from condoning or, worse still organizing or ordering, such conduct, disciplinary investigations are undertaken, criminal trials are initiated, convictions are recorded where sufficient evidence to prove guilt is forthcoming and inquiries, whether public or internal, seek to get to the bottom of what has occurred with a view to trying to learn lessons.[5]

Detention operations are, nevertheless, an essential and accepted part of the conduct of military operations during armed conflict. The capture of enemy personnel in battle and their subsequent detention deprives the party to which they belong of valuable manpower and provides the opportunity to obtain useful information as to the enemy's activities, his strengths and weaknesses, his plans and strategic intentions. The taking of such prisoners and their subsequent

[3] The relevant UK joint service doctrine publication is UK Joint Doctrine Publication 1–10, Captured Persons, 2nd edn dated October 2011 issued by the Development Concepts and Doctrine Centre, Ministry of Defence (JDP 1–10) available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/33703/20111129jdp110_Ed2_cpers.pdf.

[4] Consider, for example, the New York Times coverage of the abuse of prisoners in late 2003 and 2004 in Abu Ghraib prison, Iraq: Findings on Abu Ghraib Prison: Sadism, 'Deviant Behaviour', and a Failure of Leadership, New York Times, 25 August 2004, available at www.nytimes.com/2004/08/25/politics/25atext.html; this was but one report in the extensive, suitably critical coverage by the New York Times of the unlawful activities at Abu Ghraib.

[5] On 19 July 2005, seven UK service personnel were charged in connection with the events leading to the death of Baha Moussa. On 19 September 2006, one of these, Corporal David Payne, pleaded guilty to inhumane treatment. On 14 February 2007 charges were dropped against four of the other soldiers and on 13 March 2007 the court martial ended when all remaining defendants were acquitted; Stevenson and Weaver 2008, available at www.guardian.co.uk/uk/2008/may/14/mousa.timeline.

treatment are activities which are specifically regulated by the law of armed conflict and which are reflected in extant military doctrine.[6] Civilians may also pose a security threat to a party to an armed conflict and internment or the assignment of specified residence may be called for in order to address that threat.

Jelena Pejic has put forward a definition of internment as "the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in an armed conflict". The notion therefore extends to the detention of both military personnel and of civilians[7] and the law makes specific provision in respect of the internment of both classes of individual. In situations short of armed conflict, persons are also sometimes arrested and interned.

Persons taken into custody during and in connection with conflict will have differing status depending on the nature of the conflict, depending on the status of the relevant individual before capture and depending on what the individual was doing during the period before his capture or apprehension. In Sect. 8.2, we will briefly look at the evolution of the law of international armed conflict provisions on prisoners of war and on civilian internment in armed conflict. In Sect. 8.3, we will outline the main provisions of the modern law of international armed conflict on these subjects. In Sect. 8.4, we discuss the status of persons detained during non-international armed conflicts and the law that applies to them. In Sect. 8.5, we will consider what human rights law rules apply to detention operations in international armed conflicts, while in Sect. 8.6, we consider the provisions that apply to those detained during internal situations below the armed conflict threshold. In Sect. 8.7, we will review to what extent the likely characteristics of future warfare that we have identified elsewhere in the book appear to affect detainee operations and the associated law. In Sect. 8.8, we will seek to draw conclusions.

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[6] See JDP 1–10, para 101 which notes that during military operations UK armed forces members must be prepared to capture, detain or hold individuals for a wide variety of reasons. The treatment of such persons is recognized as of critical importance, not just for legal and policy reasons but in terms of legitimacy of the operation. Indeed, reference is made to Wellington's orders and to the consequent conduct of his troops during the Peninsular Wars in that his considerate policy was rewarded with freely given local intelligence. As to the military benefits that accrue from taking prisoners, see ibid., para 104 and for the doctrine on standards of treatment, see ibid., Chap. 2. Geoff Corn and others note the axiomatic propositions that preventing captured enemy belligerent operatives from returning to hostilities is necessary to bring about the enemy's prompt submission and that authority to attack and kill enemy operatives implies the authority to capture and detain them. "Any other interpretation of the principle of military necessity would deny the state the authority to select the more humane method of disabling the enemy"; Corn et al. 2012, pp. 312–313.

[7] Pejic 2012, p. 86.

8.2 Evolution of the Law Relating to Prisoners of War (PWs) and Civilian Detainees

Grotius opined that "to spare prisoners is commanded by the nature of goodness and justice".[8] As to the standard practice of the time, namely 1625, Grotius observes "without exception [persons] who have been captured in a formal public war become slaves from the time when they are brought within the lines […]".[9] Attitudes in that regard have changed somewhat since the time of Grotius.[10] In a Code which contains many of the notions on which the modern law of armed conflict was founded, Dr Francis Lieber[11] asserted, inter alia, that all soldiers, all members of what he called a 'rising en masse', all disabled men or officers on the field or elsewhere that are captured, and all enemies who throw away their arms and ask for quarter are PWs "and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war".[12] Lieber addressed the status of these PWs as follows: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."[13]

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[8] Grotius 1625, Book III, Chap. 11, para 13 which goes on to state that they were praised in history who, when they might have been burdened or endangered by an excessive number of prisoners, preferred to release all rather than kill them.

[9] Grotius 1625, Book III, Chap. 7, para 1.

[10] For an account of developments in the position and protection of prisoners of war and detainees before and during the French Revolutionary and Napoleonic Wars, see Scheipers 2011, pp. 395–400.

[11] Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (Lieber Code). The Lieber Code was issued by President Lincoln to the United States forces as General Orders No 100 on 24 April 1863. While it accordingly had domestic law status binding the members of those armed forces, it is not a source of international law, although it is a valuable indication of what accepted law then comprised. Dr Lieber's thinking was, no doubt, influenced by the writings of Charles de Secondat, Baron de Montesquieu, and more specifically, perhaps, by those of Rousseau 1950, pp. 7–11.

[12] Lieber Code, Article 49(2). Note, however, Article 60 of the Code which does not reflect the law today. Yoram Dinstein comments that the regime of PW is based not only on deprivation of liberty but also on substantial guarantees of life, health and dignity; Dinstein 2006, p. 148. In Article 50 of the Lieber Code, citizens who accompany the army for whatever purpose, including sutlers, editors or reporters of journals or contractors may be made PWs on capture. In Article 53 Lieber provides that if chaplains, medical staff, nurses, apothecaries and servants fall into enemy hands they may be retained, in which case they shall be treated as PWs, but may be exchanged.

[13] Lieber Code, Article 56. In Article 57, Dr Lieber provided for combatant immunity and Article 58 prohibited enslavement of captured army personnel. It was noted in Article 59 that PWs are answerable for crimes committed before capture for which they have not been punished by their own authorities.

The Brussels Declaration[14] noted that PWs "are in the power of the hostile Government, but not that of the individuals or corps who captured them", that they must be humanely treated and that their personal possessions other than arms remain their property.[15] The Oxford Manual[16] asserts that captured members of the enemy armed forces are to be treated as PWs.[17] Confinement of PWs would not be a penalty for a crime, nor an act of vengeance but is temporary and non-penal. While they are entitled to due consideration, the need for secure confinement of them is acknowledged.[18] The provisions of the Brussels Declaration are then generally repeated in similar but not necessarily identical form.

The first treaty provision in relation to PWs consisted of the Regulations attached to Hague Convention II of 1899, largely repeated in the subsequent and authoritative Regulations of 1907.[19] On the basis of the 1907 text, Article 4 provides that PWs are in the power of the hostile Government but not of the capturing individuals or corps, that they must be humanely treated and that their personal property other than arms, horses and military papers remain their property. PWs could be interned but could only be confined so long as necessary as a measure of safety.[20] Prisoners other than officers could be required to do appropriate work for the state, for other branches of the public service or for private persons and wages, maintenance, board, lodging and clothing were all provided for.[21] Attempts to escape, if unsuccessful, and offences committed to facilitate escape that do not involve violence against life or limb or theft with the intention of self-enrichment

[14] Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874 (Brussels Declaration). The Declaration, prepared by jurists and others, was never adopted by States in treaty form and therefore does not have the status of a source of international law. It is nevertheless an informed statement of the then state of the law.

[15] Brussels Declaration, Article 23. Article 24 provided for their internment with an obligation not to go beyond specified limits or, if safety indispensably so required, for their confinement. Subsequent Articles address work and wages, that they cannot be compelled to undertake operations of war, arrangements as to their maintenance, prisoner of war discipline, prisoner exchange and release and breach of pledge; see Articles 25–34.

[16] The Laws of War on Land, Oxford, 9 September 1880. Prepared under the auspices of the Institute of International Law, the Oxford Manual as it is known was offered as being "suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies"; Preface to the Oxford Manual. It also does not have the status of a source of international law but discloses what informed opinion then considered the law to be.

[17] Oxford Manual, Article 21(1). Interestingly civil aeronauts charged with observing the enemy or maintaining communications are also given prisoner of war status on capture.

[18] Oxford Manual, Part III, Sect. A.

[19] Regulations Respecting the Laws and Customs of War on Land Annexed to Convention IV Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations).

[20] Hague Regulations, Article 5.

[21] Hague Regulations, Articles 6 and 7 and see Article 17.

only attract liability for disciplinary punishment.[22] There were then particular provisions as to the information a prisoner of war is bound to give to his captors; arrangements as to release on parole; and that persons following the army without being members of it, such as newspaper correspondents and reporters, sutlers and contractors, if detained by the enemy, are entitled to treatment as PWs if in possession of a certificate from the military authorities they were accompanying.[23] The establishment of offices to deal with enquiries about prisoners, provision as to relief societies and as to religious freedom of prisoners, as to their wills and their repatriation after the conclusion of peace are set forth in additional articles.[24]

The 1929 Prisoner of War Convention[25] represented a significant development in the law, not only in terms of the extent of the provision in its 97 Articles and its Annex, but also in the prescriptive detail that those provisions contained. An account of the provisions of the 1929 Convention, however, lies outside the scope of this chapter, not least because the relevant provisions of the current law will be addressed in Sect. 8.3.

8.3 The Law of International Armed Conflict as to PWs and Civilian Detainees

As with other elements of the law of armed conflict, the law relating to detention is characterized by certain divisions. There is the distinction between the relevant law applying in international armed conflict, consisting largely of Geneva Conventions III and IV of 1949[26] as supplemented by Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API 1977) and customary law, and that applying in non-international armed conflicts, as set forth in Common Article 3 to the 1949 Geneva Conventions, Additional Protocol II and customary law. There is then the division between the classes of individual protected by the two Conventions, namely and respectively PWs and in broad terms civilians in enemy hands. There is also not so much a division as a distinction between the lex specialis of the law of armed conflict and the lex generalis of international human rights law; the not entirely settled relationship between these bodies of law is discussed in Chaps. 9 and 10.

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[22] Geneva Convention III, Article 93; a prisoner who after escaping and returning to his own lines is taken prisoner again is not liable to punishment for his previous escape; see Article 8, Hague Regulations.

[23] Hague Regulations, Article 13; see Corn et al. 2012, pp. 140–141.

[24] Hague Regulations, Articles 14–16 and 18–20.

[25] Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

[26] Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

8.3.1 Prisoners of War Protection Under Geneva Convention III[27] and API

The power to subject PWs to internment is contained in Geneva Convention III[28] and the power to intern or assign residence to civilians is contained in Geneva Convention IV.[29] As Jean Pictet in his Commentary to Geneva Convention IV and the International Criminal Tribunal for the Former Yugoslavia in the Delalić case make clear, "[i]f an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its Article 4 requirements are satisfied".[30]

A thorough discussion of the law relating to all aspects of detainee operations would fill a substantial volume, and much of the detail would fall outside the intended focus of this book.[31] In the rest of this section, therefore, we will refer briefly to only the most general rules as to the treatment of PWs and interned civilians in international and, respectively, non-international armed conflicts. We will then seek to concentrate on the relevant procedures that the law of armed conflict prescribes in relation to the categories of detained person that have been mentioned.

Certain rules in the law of armed conflict apply to all detained persons. Thus, the prohibition of torture is of general application. Torture is prohibited in relation to both international[32] and non-international armed conflict,[33] and whether perpetrated against PWs or civilians.[34] The following activities, when perpetrated against

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[27] The categories of person entitled to prisoner of war status on capture are listed in Geneva Convention III, Article 4. Note the important distinction between entitlement to prisoner of war status and entitlement to participate directly in hostilities, discussed in Corn et al. 2012, pp. 282–287. For a discussion of Geneva Convention III, see Kalshoven and Zegveld 2011, pp. 53–57.

[28] Geneva Convention III, Article 21, provides: "The Detaining Power may subject prisoners of war to internment".

[29] Geneva Convention IV protects the civilians referred to in Article 4.

[30] *Prosecutor v. Delalić*, Judgment, 16 November 1998, Case number ICTY-96-21 at para 271 and Pictet 1956, p. 51.

[31] As to the law of armed conflict provisions relating to prisoners of war, see for example Green 2008, pp. 224–241.

[32] Geneva Convention I, Articles 12(2) and 50; Geneva Convention II, Articles 12(2) and 51; Geneva Convention III, Articles 17(4), 87(3) and 130; Geneva Convention IV, Articles 27(1), 32, 118(2) and 147; API, Article 75(2)(a)(ii).

[33] Geneva Conventions 1949, Article 3(1) and APII, Article 4(2).

[34] Consider the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, New York, 10 December 1984 and Pejic 2012, p. 85. The elements of the crime of torture for the purposes of the Rome Statute of the International Criminal Court, 1988, Article 8(2)(a)(ii), are: (1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) The perpetrator inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation, or coercion or for any reason based on discrimination of any kind; (3) Such person or persons were protected under one or more of the

persons protected by the Geneva Conventions, are grave breaches of the Conventions and, thus, war crimes under the Rome Statute of the ICC. The offences are willful killing; torture or inhuman treatment including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and the taking of hostages.[35]

Positively expressed and often detailed rules deal with conditions of detention, the provision of food, shelter, medical care, hygienic conditions, the ability to communicate externally and matters relating to the religious requirements of internees. Provisions of the law of armed conflict as to the fair trial of internees accused of criminal offences committed before capture will be considered below.

Because PWs are in the hands of the enemy Power, not of the individuals who effected their capture, it is the Detaining Power that is responsible for the treatment they receive.[36] The fundamental rule is that PWs must always be humanely treated and are at all times entitled to respect for their persons and their honour.[37] They may

(Footnote 34 continued)
Geneva Conventions of 1949; (4) The perpetrator was aware of the actual circumstances that established that protected status; (5) The conduct took place in the context of and was associated with an international armed conflict and (6) The perpetrator was aware of factual circumstances that established the existence of an armed conflict. See ICC Elements of Crimes, available at www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf, p. 14. For a discussion of the law relating to torture, see Solis 2011, pp. 436–474. For a criticism of the US approach to, and interpretation of, the prohibition of torture see Shue 2011, pp. 473–478.

[35] Such activities are grave breaches of the Geneva Conventions 1949; see Rome Statute 1998, Article 8(2)(a).

[36] GCIII, Article 12(1). Transfer of PWs can only be made to a Party to the Convention which, the Detaining Power is satisfied, is willing and able to apply the Convention; the Detaining Power retains certain obligations after transfer; see GCIII, Article 12(3) and for the UK doctrine on transfer, see JDP 1-10, Chap. 12.

[37] GCIII, Articles 13(1) and 14(1). So any unlawful act or omission causing death or serious danger to health, including physical mutilation or medical or scientific experiments not undertaken in the interest of the prisoner and not justified by his condition are prohibited; PWs must always be protected, e.g. against violence, intimidation, insults and public curiosity. Tony Rogers discusses the lawfulness of showing prisoners of war on television, commenting that the interests of prisoners of war have to be balanced against the legitimate interest of the media in reporting on developments in a war. Citing a protest by Donald Rumsfeld following the showing of captured US service personnel on al-Jazeera television, Tony Rogers reports that the UK Ministry of Defence asked journalists to ensure that the faces of Iraqi prisoners of war were pixillated or obscured to prevent their identification; Rogers 2012, pp. 60–61. Respect for persons and honour implies that women must be treated with due regard, that PWs retain full civil capacity, that the detaining Power must provide free of charge for their maintenance and, subject to what has already been stated, that there shall be no adverse discrimination on the grounds listed in the Convention; GCIII, Articles 13(2), 14(2) and (3), 15 and 16. Tony Rogers discusses

be prosecuted for war crimes or other violations of international humanitarian law[38] but not for hostile acts undertaken in compliance with the law of armed conflict.[39]

For states that are party to API, the position is simply that, in addition to the persons entitled to prisoner of war status under Article 4 of Geneva Convention III, those who have combatant status are prisoners of war if they fall into the hands of an adverse Party to an international armed conflict.[40] A combatant only loses prisoner of war status if, in the unusual circumstances of combat referred to in the second sentence of Article 44(3), he fails to carry his arms openly during each military engagement and while visible to the adversary while deploying before launching an attack in which he is to participate.[41] It follows from this that persons in the power of an adverse party to the conflict who do not come within Article 4 of Geneva Convention III, who are not combatants and who are not entitled to retained personnel status as medical personnel or chaplains,[42] are civilians to whom Geneva Convention IV will potentially apply. Yoram Dinstein points out that captured medical and religious personnel cannot be detained as prisoners of war but may be retained to exercise their medical and spiritual functions for the benefit of the PWs. The distinction can have consequences, as while PWs need only be released after the end of active hostilities which may involve a lengthy period of detention, continued retention of retained personnel must be justified by a 'real and pressing need'.[43]

API creates a presumption of prisoner of war status in relation to all persons who claim that status, or who appear to be entitled to it or if the Party on which the relevant person depends claims that status on their behalf either directly to the detaining Power or through the Protecting Power. Where there is 'any' doubt as to the person's entitlement to prisoner of war status, he shall retain that status and the associated protection under the Convention and under API "until such time as his status has been determined by a competent tribunal".[44] These tribunals "are meant

(Footnote 37 continued)
mistreatment of prisoners in Iraq and emphasizes the importance of the early stages of captivity; Rogers 2012, pp. 59–65.

[38] Such as crimes against humanity.

[39] API, Article 43(2).

[40] API, Article 44(1). All members of the armed forces other than medical personnel and chaplains are combatants; members of the armed forces comprise all individuals who come within Article 43(1).

[41] API, Article 44(4), but note para (5); note also the statement as to Article 44(3) made by the UK on ratification of API on 28 January 1998: "It is the understanding of the UK that: the situation in the second sentence of para 3 can only exist in occupied territory or in armed conflicts covered by para 4 of Article 1; 'deployment' in para 3(b) means any movement towards a place from which an attack is to be launched".

[42] See Geneva Convention I, Articles 24, 26 and 28.

[43] Dinstein 2006, pp. 147–148 citing Pictet 1952, p. 241.

[44] Geneva Convention III, Article 5 and API, Article 45(1). The person who is detained has the right to have his entitlement to be a prisoner of war determined individually. A person who is in the power of an adverse Party, who is not being held as a prisoner of war and who is to be tried

to operate in or near the zone of combat; they only determine status, not criminal or any other responsibility".[45]

There is no obligation to review, judicially or otherwise, the lawfulness of continued internment of a prisoner of war while active hostilities are continuing "because enemy combatant status denotes that a person is ipso facto a security threat".[46]

8.3.2 *Civilians Protected Under Geneva Convention IV and API*

Subject to certain exclusions in Article 4(2), the civilians who are protected persons under Geneva Convention IV consist of individuals who are not protected by Geneva Conventions I, II or III and who "at any moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[47]

It is important to appreciate that of the protective provisions referred to below, those coming within Articles 35–46 apply to aliens in the territory of a party to the conflict, whereas Articles 47–78 apply to protected persons in occupied territory. Article 27(4) permits the Parties to the conflict to take such measures of control and security in regard to protected persons as may be necessary as a result of the war. Certain measures, including those referred to in Articles 32–34, are prohibited and Article 35 (application to leave the territory), Article 36 (departures pursuant to Article 35), Article 37 (conditions of confinement of those with pending proceedings or convicted of an offence), Article 38 (rights of protected persons), Article 39 (matters related to continued employment or support) and Article 40 (assigned work) must be complied with.

(Footnote 44 continued)
for an offence arising out of the hostilities has the right to assert prisoner of war status before a judicial tribunal and to have the issue adjudicated. Generally this adjudication should happen before trial and the Protecting Power should be informed and may attend the adjudication; API, Article 45(2). For the UK doctrine as to the implementation of these obligations, see JDP 1–10, para 130 and Annex 1A and for a discussion of United States practice in Panama and in Afghanistan, see Corn et al. 2012, pp. 319–321.

[45] Pejic 2012, p. 87.

[46] Pejic 2012, p. 87. PWs must be released at the cessation of active hostilities unless they are subject to criminal proceedings or are serving a sentence for a crime; Geneva Convention III, Articles 118 and 119.

[47] Non-belligerent civilians are not covered by this provision because they are protected anyway by virtue of the diplomatic relations that their state retains with the belligerent state. For a list of the classes of civilians not protected by Geneva Convention IV, see Dinstein 2006, p. 149. For a discussion of the rules of the law of armed conflict for the protection of civilians, see Green 2008, pp. 256–279.

Article 41 prohibits recourse to measures of control more severe than assigned residence or internment for civilians. Assigned residence or internment is only permitted under Article 42(1) if the security of the Detaining Power makes it absolutely necessary. Various activities may cause the Detaining Power to conclude that its security requires such action, including recruitment for combat, financial support for combat and provision of arms, ammunition and training for combat. Civilians whose detention is absolutely necessary for the security of the Detaining Power may be detained in the territory of that Power[48] and where imperative reasons of security require it, civilians may be interned in occupied territory.[49]

Article 43 gives a protected person who has been interned or placed in assigned residence the right to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. The purpose of such review is to determine whether the information on which the internment is based is reliable and whether the activities of the individual continue to justify internment of him or her.[50] The interned person may challenge his or her internment; the review must be undertaken expeditiously, must be undertaken by a court or administrative board and if the internment is maintained, periodic review thereafter must occur every 6 months "with a view to the favourable amendment of the initial decision, if circumstances permit".[51]

Article 78 provides for similar safety measures of internment or assigned residence of protected persons in occupied territory and requires that such decisions shall be "made according to a regular procedure to be prescribed by the Occupying Power" in accordance with the Convention, it would seem specifically in accordance with Article 43. The procedure must include a right of appeal, with appeals being decided with the least possible delay. If the decision to detain or assign residence is upheld, Article 78(2) requires that it must be subject to "periodic review, if possible every 6 months, by a competent body set up by the [Occupying] Power".[52] The power to detain civilians, however, ends when the reasons justifying internment no longer apply.[53] All internment of civilians must come to an end as soon as possible

[48] Geneva Convention IV, Article 42(1).

[49] Geneva Convention IV, Article 78(1).

[50] For a critique of how these processes were operated in Iraq, see Wall 2007, pp. 435–436.

[51] Geneva Convention IV, Articles 41 and 78 and Pictet 1956, pp. 261, 368–369.

[52] As to the implementation of these requirements from April 2003 to June 2004 in Iraq, see Wall 2007, pp. 424–428, and note the relatively recent policy to provide a personal representative to assist with case preparation and increased opportunity for detainee's witnesses to appear and discussion of Multi-National Force Review Committee procedures under Coalition Provisional Authority Memorandum 3 for Iraq and Detention Review Boards in respect of Afghanistan; Corn et al. 2012, pp. 322–323.

[53] Geneva Convention IV, Article 132 and API, Article 75(3).

after the close of hostilities and unjustified delay in repatriating civilians is prohibited,[54] although Geneva Convention IV continues to apply until release occurs.

8.3.3 Fundamental Guarantees Under API

Article 75 of API is something of a 'Convention within a Protocol'. Its fundamental guarantees dictate the arrangements that must be applied, as a minimum, to all persons in the power of an adverse party to the conflict. It will be of greatest relevance to those who do not, as to a particular matter, benefit from more advantageous treatment by virtue of other provisions of international law, such as Geneva Convention III or IV.[55] For Article 75 to apply as a matter of treaty law, there must be an international armed conflict, occupation or armed conflict to which Article 1(4) of API applies. The protections in Article 75 apply to persons arrested, detained or interned for reasons related to an armed conflict until "their final release, repatriation or re-establishment even after the end of the armed conflict".[56] While many of the rules in Article 75 match human rights based norms, there is of course a significant point of distinction, namely that Article 75 is not subject to the rights of derogation or suspension provided for in human rights treaties.[57]

The non-international armed conflict treaty rules that broadly correspond with Article 75 of API are Articles 4 and 5 of Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, also adopted in Geneva on 8 June 1977 (APII 1977) and these reflect customary law rules applicable to such conflicts. The rules in Article 75 also reflect customary rules that are applicable in

[54] Geneva Convention IV, Article 46 provides that restrictive measures relating to protected persons "shall be cancelled as soon as possible after the close of hostilities" and that restrictive measures affecting their property shall be cancelled in accordance with the law of the Detaining Power as soon as possible after the close of hostilities. Article 133(1) requires that internment "shall cease as soon as possible after the close of hostilities" while API, Article 85(4)(b) characterized unjustified delay in the repatriation of PWs as a grave breach if committed willfully in violation of the Protocol.

[55] API, Article 75(8) and see Krähenmann 2013, pp. 368–369. Examples of those in less favourable circumstances may include, for example, spies or those accused of espionage, mercenaries or those accused of being mercenaries. Note that API grants persons held in occupied territory rights of communication as set out in Geneva Convention IV, notwithstanding Article 5 of that Convention, unless the person is held as a spy; API, Article 45(3).

[56] API, Article 75(6).

[57] Consider Sandoz et al. 1987, para 3006. See the US position on Article 75 at White House Fact Sheet: New Actions on Guantanamo and Detainee Policy 3, 7 March 2011, p. 3, available at www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy; "The US Government will […] choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well".

non-international armed conflicts to which Common Article 3 alone applies.[58] Persons who benefit from more favourable treatment under other provisions of the Conventions or of the Protocol must be accorded that more favourable treatment. For those who do not, the following are, essentially, the minimum acceptable standards of treatment[59]:

- They must be treated humanely in all circumstances and must be granted the following protections without any adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.
- Each Party to the conflict must respect the person, honour, convictions and religious practices of all such persons.[60]
- Certain acts are prohibited at all times and places whether committed by armed forces or civilian agents, namely violence to life, health, or physical or mental well-being of persons, in particular murder, torture of all kinds, whether physical or mental, corporal punishment and mutilation. Similarly prohibited are outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault, the taking of hostages, collective punishments and threats to commit any of the listed acts.[61]

Article 75 includes safeguards for persons who have been arrested, detained or interned for activities associated with the armed conflict. They must be promptly informed in a language they understand of the reasons why such measures have been taken. The persons concerned must be released with the minimum possible delay and at any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist; this does not, however, apply where arrest or detention relates to penal offences.[62]

Certain procedural requirements must be complied with before a sentence can be passed or a penalty can be executed on a person found guilty of a penal offence related to the armed conflict. These are:

a. the conviction must have been pronounced by an impartial and regularly constituted court that respects the generally recognized principles of regular judicial procedure, which must include the following requirements;

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[58] Corn et al. 2012, pp. 323–324 and Henckaerts and Doswald-Beck 2005, Rules 87–105. These rules are therefore of importance to rebels taken prisoner in such conflicts who will lack combatant status.

[59] API, Article 75(1). Yoram Dinstein cites unlawful combatants not entitled to prisoner of war status as examples of persons not entitled to more favourable treatment and confirms the customary law status of the rule; Dinstein 2006, pp. 155.

[60] API, Article 75(1).

[61] API, Article 75(2).

[62] API, Article 75(4).

b. the procedure must provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
c. no one shall be convicted of an offence except on the basis of individual penal responsibility;
d. no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed;
e. a heavier penalty than that which was applicable at the time when the criminal offence was committed shall not be imposed;
f. if, after commission of the offence, provision is made in the law for the imposition of a lighter penalty, the offender must benefit thereby;
g. anyone charged with an offence is presumed innocent until proved guilty according to law;
h. anyone charged with an offence must have the right to be tried in his presence;
i. nobody shall be compelled to testify against himself or to confess his guilt;
j. anyone who is charged with an offence shall have the right to examine, or to have examined, the witnesses against him;
k. anyone charged with an offence shall have the right to obtain the attendance and examination of witnesses on his own behalf on the same conditions as witnesses against him;
l. no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting him has been previously pronounced under the same law and judicial procedure;
m. anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
n. a convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised.[63]

In its concluding paragraphs, the Article includes specific provisions to safeguard women and families who are interned[64]; to reaffirm that persons accused of war crimes and crimes against humanity should be submitted for prosecution and trial in accordance with international law[65] and to reaffirm the applicability of the protections in the Conventions and in the Protocol even to persons accused of grave breaches.[66] Clearly, many of the Article 75 provisions are consistent with provisions in human rights treaties, such as the International Covenant on Civil and Political Rights, and in numerous respects they are broadly equivalents of one another.[67]

[63] API, Article 75(4).
[64] API, Article 75(5).
[65] API, Article 75(7)(a).
[66] API, Article 75(7)(b).
[67] Sandoz et al. 1987, para 3092.

During the Afghanistan War, the Bush Administration determined that neither Common Article 3 nor Geneva Convention III applied to Taliban and Al Qaeda fighters who were taken prisoner. Such persons were effectively left without protection by a decision that Francoise Hampson has described as follows: "The blanket denial of Prisoner of War status to members of the Taliban, on the basis that Geneva Convention III did not apply as a matter of law, was not consistent with the Conventions."[68] Bill Lietzau, however, has explained why it was felt that Al Qaeda fighters fall outside the scope of the Conventions as currently crafted. He charts the US preference for the employment of the law enforcement paradigm, and explains the emerging policies as designed to address the legal Conundra associated with, for example, indefinite detention of persons not benefiting from Geneva Convention safeguards in order to address the perceived future threat they are considered to pose. Citing the remarks of John Reid in April 2006, he concludes that a "failure to participate thoughtfully and deliberately in fashioning the legal norms that are being developed—norms that will guide the global community for the next century—would constitute a missed opportunity of substantial moment".[69]

This comment is well-made, and any such process must of necessity seek to grasp all of the relevant 'nettles' that collectively comprise the problem. Policy discussions, for example those associated with the Copenhagen Process referred to below, are likely to contribute helpfully to the search for solutions. Perhaps the realization by states in general that conflicts with loosely associated networks such as that currently being undertaken against Al Qaeda are liable to be repeated in the future and that such conflicts can be expected to present states other than the US with similarly intractable legal challenges will help to lead international discussion towards agreed arrangements that will at least mitigate those challenges.[70]

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[68] Hampson 2012, p. 264. See the US Supreme Court decision in the case of *Boumediene et al v Bush,* President of the United States et al, No. 06-1195, October Term 2007, decision dated 12 June 2008, as to the applicability of habeas corpus jurisdiction to certain persons detained by the United States at the Guantanamo Bay detention facility in Cuba. As to the arrangements made by the Obama Administration for periodic review of persons held in detention in Guantanamo Bay, see Executive Order 13567, Periodic Review of Individuals Held in Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, dated 7 March 2011, available at www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava.

[69] Lietzau 2012, p. 338, citing Reid 2006.

[70] Moreover, Sybille Scheipers suggests that it is important to consider the historical development that led to the exclusion of irregular fighters from prisoner of war protection in order to consider what standards for the treatment of unlawful combatants in current operations are justified and desirable; Scheipers 2011, p. 406.

8.4 Detainees in Non-international Armed Conflicts

Leslie Green suggests that "[i]n non-international armed conflicts it is perhaps more necessary to make provision for the protection of those who fall into the hands of their opponents than is the case in an international conflict, when ideologies and emotions are not normally so important".[71] The treaty law protections for internees in non-international armed conflicts are to be found in common Article 3 and in Articles 4, 5 and 6 of Additional Protocol II. Common Article 3's focus is on the protection of those taking no active part in the hostilities, and its core requirement is that all such persons be treated humanely[72] and that there be no adverse distinction based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. The acts listed in para 1 of the Article are therefore prohibited. The procedural safeguards in sub-para (d) are, of course, somewhat brief and basic, although the assumption at the time would have been that domestic law would apply and would, for example, provide the authority to detain. As noted earlier in this chapter, however, the more comprehensive provisions of Article 75 of API are now recognized as representing customary law applicable in both international and non-international armed conflicts. Those provisions were listed in full in Sect. 8.3.3 and will not therefore be repeated here.

Additional Protocol II, Article 4, sets out some fundamental guarantees for those who do not take a direct part in the hostilities or who have ceased to do so. Many of the listed protections are rather overtaken by the customary law application to non-international armed conflicts of the Article 75, API protections.[73] Article 5 of APII deals with the protection of persons whose liberty has been restricted. Its provisions do not address the grounds on which a person may be arrested, interned or detained during a non-international armed conflict, nor does it address the review of such internment or detention. As to release, the Article merely provides that necessary measures must be taken to ensure the safety of persons it is decided to release.[74]

Article 6 applies to the prosecution and punishment of criminal offences related to the armed conflict. It sets out some essential guarantees of independence and

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[71] Green 2008, p. 355.

[72] Daniel Thürer complains that protection of the rights of persons affected is insufficiently elaborated beyond the requirement for 'humane treatment' and thus no longer satisfies all humanitarian needs that are emerging from practice, leading to the conclusion that it will be necessary to draw from human rights law when devising procedural principles and safeguards to regulate internment in non-international armed conflicts; Thürer 2011, p. 143. An alternative, and perhaps more attractive, view would be to acknowledge the insufficiency and to seek to apply law of international armed conflict rules by analogy, to the extent that the differences between the two kinds of conflict sensibly permit.

[73] Article 4, APII, does, however, contain important additional protections for children.

[74] APII, Article 5(4). A similar obligation will apply to persons whose detention was pursuant to a conflict to which common Article 3 applied; this follows from the general requirement in that Article as to humane treatment. Relevant domestic law will apply.

impartiality of penal prosecutions, most of which duplicate the more comprehensive provisions in Article 75 of API that are applicable as customary law during non-international armed conflict,[75] both those to which Common Article 3 applies and those referred to in Article 1(1) of APII. As we have seen, there is no specific provision as to the grounds on which a person may be interned nor as to the procedures attendant upon such internment.[76] Domestic law will regulate internment decisions in non-international armed conflict, and should reflect the customary law rules in Articles 4 and 5 of APII and human rights law.[77]

The situation confronting an armed group involved in a non-international armed conflict (NIAC) that wishes to capture and detain government personnel is difficult, to put it mildly. As Marco Sassoli has succinctly put it:

> Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain a military advantage. If the non-state actor cannot legally intern members of government forces it is left with no option but either to release the captured enemy fighters or to kill them. The former is unrealistic, because it obliges the group to increase the military potential of its enemies, the latter is a war crime.[78]

It is clearly inappropriate for applicable law to require armed groups to fulfil procedural safeguards that their circumstances render impractical.

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[75] Article 6 provides that the death penalty shall not be pronounced on persons who were under the age of 18 at the time of the offence and shall not be carried out on pregnant women or mothers of young children; Article 6(4). The Article also requires that, at the end of the hostilities, the authorities in power endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict and to those interned or detained for reasons related to the armed conflict; Article 6(5).

[76] Note Marco Sassoli's comment that it is difficult to persuade parties to comply with rules not binding on their enemy; he wonders whether it is realistic of the ICRC in their Customary Humanitarian Law Study, pp. 348–351, to find an obligation to provide a person deprived of their liberty during a NIAC with an opportunity to challenge the lawfulness of the detention as this would require armed groups to legislate or would deprive them of the opportunity even to detain government soldiers; Sassoli 2010, p. 17. Louise Arimatsu points out that in the Congo War the absence of international law rules regulating detention in non-international armed conflict resulted in grave consequences for those detained in the course of that conflict; Arimatsu 2012, p. 199. Rob McLaughlin explains the Australian approach to detainee treatment issues arising in East Timor and in Afghanistan at McLaughlin 2012, pp. 310–313.

[77] In Chap. 2 we considered the 2006 hostilities involving Israel and Hezbollah in Lebanon, Iain Scobbie's extensive analysis of the relevant events and of the status of the conflict and the observation that there are contradictory indicators as to whether an international or non-international armed conflict took place. The conclusion that international and non-international armed conflicts were taking place in parallel affected the status of Hezbollah fighters on capture. The status of the Israel-Hezbollah conflict as an extra-territorial non-international armed conflict rendered the question of their POW status irrelevant, and they were dealt with under domestic Israeli law; Scobbie 2012a, pp. 417–419.

[78] Sassoli 2010, p. 17.

Knut Dörmann puts forward the ICRC suggestion that states should consider strengthening the legal framework on transfer of detainees during non-international armed conflicts, for example by identifying particular rules and responsibilities in that area and taking the rules applicable in international armed conflict as a starting point. He also draws attention to the ICRC Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence.[79]

Marco Sassoli and Laura Olson also consider whether application of the law of international armed conflict by analogy might solve the problem. The adaptation to make the analogy work would involve applying the rules according to the person's function or activities as opposed to his status. They contemplate the application of analogous review procedures, possibly by an administrative body in the case of non-state actors who have to achieve a certain degree of organization for the conflict to be classified as a non-international armed conflict. This would imply that there would be no review process where fighters in an analogous position to interned combatants are detained. Undoubtedly such an approach still involves some difficult issues, such as whether tribunals analogous to those under Article 5, Geneva Convention III, are required and which criteria should determine the distinction between fighters and civilians, and perhaps these issues would render the application of Geneva Convention IV alone by analogy a more promising way forward.[80]

Of course, as Dinstein points out citing the American Civil War as a example, the rebellion may achieve such magnitude and intensity that the government has no choice but to recognize the belligerency of the rebels with the result that the law of international armed conflict will apply, including combatant status for the rebels who will thus be entitled to PW status on capture.[81]

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[79] Dörmann 2012, pp. 351, 356. The Principles and Guidelines appear as Annex 1 to ICRC Report International Humanitarian Law and the Challenges of Contemporary Armed Conflicts presented at the 30th International Red Cross Conference in 2007 in Geneva and available at 87 IRRC 375 (2005). He also refers to the proposal that the non-international armed conflict rules on material conditions of detention be supplemented, ICRC Report International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, p. 352.

[80] Sassoli and Olson 2008, p. 624.

[81] Dinstein 2006, p. 150. Absent recognition of belligerency, in non-international armed conflicts there is no combatant status; Dinstein 2006, p. 151. Consider also the effect of the state party imposing a blockade during a non-international armed conflict, thereby implicitly recognizing the belligerency of the rebel group and thus raising the issue of the entitlement of captured rebel fighters to prisoner of war status; Scobbie 2012b, pp. 302–312. Consider also the claims by FARC and by ELN to belligerency in connection with the armed conflict in Colombia discussed at Szesnat and Bird 2012, pp. 221–223. It does not appear that any such recognition has been granted during the twentieth century by a state in the territory of which a non-international armed conflict was taking place.

8.5 Internment and Human Rights Law

8.5.1 Internment, Human Rights Law and International Armed Conflict

The decision to intern prisoners of war, the arrangements for their maintenance, the right to keep them in internment until the conclusion of hostilities and the associated procedures for determining their status and for disciplining them are matters specifically regulated by the law of armed conflict. Jann Kleffner explains that

> when international humanitarian law stipulates that prisoners of war may, as a rule, be detained until the cessation of active hostilities without having the right to legally challenge that detention, while human rights law provides for a right of everyone to make such challenges, the latter right is set aside as far as prisoners of war are concerned.[82]

The Grand Chamber of the European Court of Human Rights in the Al Skeini case has maintained the basic proposition that extra-territorial jurisdiction under Article 1 of the European Convention is the exception rather than the rule. One such exceptional circumstance would, however, arise where state agents use force to bring an individual under the authority and control of state authorities. "What is decisive in such cases is the exercise of physical power and control over the person in question."[83] The judgment then refers to the obligation in such circumstances being to secure to the individuals in question the rights that are relevant to their situation, noting that therefore the Convention rights can in that sense be divided and tailored.[84] The relevant authority and control may be exercised by members of the armed forces, members of its secret services or any other State agent.[85]

Noting that 'operational detainees' are within the jurisdiction of the Detaining Power, Jann Kleffner also observes that "human rights law applies to the relationship between the individual detainee and the detaining authority. Human rights law primarily supplies standards of treatment and procedural guarantees". So, while the procedural guarantees to which prisoners of war are entitled are generally speaking those set out in Geneva Convention III and in API, the human

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[82] Kleffner 2010a, p. 74 referring to Geneva Convention III, Articles 21 and 118 and to European Convention, Article 5(4), International Covenant on Civil and Political Rights, Article 9(4) and Inter-American Convention on Human Rights, Article 7(6). Marco Sassoli comes to similar conclusions; Sassoli 2011, p. 73. Marco Sassoli, however, believes that the *lex specialis* permitting prisoners of war to be detained without judicial supervision cannot be applied by analogy to other cases of detention of persons who are not prisoners of war; Sassoli 2011. See also Schabas 2007, p. 612. Note that by virtue of Article 14(3) of Geneva Convention III, prisoners of war retain full civil capacity during the period of detention.

[83] *Al Skeini v. United* Kingdom (2011) 53 EHRR 18, paras 138–149, particularly 146 and 149; see also *Al-Jedda v. United Kingdom* (2011) 53 EHRR 18 at para 85.

[84] *Al Skeini*, n. 83 above, para 137.

[85] *Ministry of Defence v. Deborah Albutt*, *Daniel Twiddy and Andrew Julien*, UK Court of Appeal, (2011) EWHC 1676 (QB) judgment dated 19 October 2012, para 28.

rights law right to challenge detention does not apply to them. Human rights law and the law of armed conflict do, however, require detaining authorities to treat all internees, including prisoners of war, with humanity and respect for their inherent dignity, to include ensuring that they are not subjected to hardships or constraints other than such as result from the deprivation of liberty.[86]

8.5.2 *Internment, Human Rights Law and Non-international Armed Conflict*

The author regrets that anyone hoping to find in this subsection clarity as to the application of human rights law to detention operations during non-international armed conflict is likely to be disappointed. The author's role is, however, to seek to report the current state of the law as it is, warts and all, rather than to make the resulting picture aesthetically pleasing or artificially straight-forward.

Starting with the International Covenant of Civil and Political Rights, the circumstances in which derogation in order, for example, to permit internment during a non-international armed conflict, is possible, how it should be done and the consequences of doing so are set out in Human Rights Committee General Comment Number 29.[87] Of vital importance, it must be noted that neither domestic law nor human rights law will authorize detention operations by organized armed groups involved in a non-international armed conflict. As Jelena Pejic has commented, "the increasingly widespread claim that human rights law must be resorted to when international humanitarian law is silent on a particular issue—such as procedural safeguards on internment—ignores the legal and other limits of the applicability of human rights law to non-State parties to non-international armed conflicts".[88]

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[86] Kleffner 2010b, pp. 468, 473. See Corn 2008, p. 73; analyzing the matter by analogy with peacetime functions of governmental authorities, he concludes that "a human rights oriented conception of what constitutes arbitrary State action vis a vis [non-participants in conflict and those rendered hors de combat] is understandable and in many respects logical". Knut Dörmann comments that some of the most evident differences between human rights law and international humanitarian law concern procedural safeguards for security detainees and that in the non-international armed conflict context, International Humanitarian Law is critically important because only it binds non-state organized armed groups involved in such conflicts; Dörmann 2012, pp. 348–350.

[87] See General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 dated 31 August 2001, available at www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument; see also Pejic 2012, p. 90.

[88] Note that a state's legal obligations under Human Rights treaties are not legally shared by the non-state party, save when "stable control over a part of national territory that has enabled them to develop and perform government-like functions" exists; Pejic 2012, p. 83. It should be noted that the Human Rights Committee is in the process of revising its General Comment on Article 9 of the ICCPR. The current draft of the revised text is available at www2.ohchr.org/english/bodies/hrc/comments.htm and particular reference should be made to paras 67–69 of the text.

Under the European Convention, internment under procedures not providing for judicial review would require derogation from Article 5 of the Convention.[89] Jelena Pejic reasonably points out that where a state is going to the assistance of another state in a non-international armed conflict taking place in that second state, it is difficult to see how this could properly be regarded as a situation threatening the life of the assisting nation, with the result that the legal basis for a derogation by that assisting state becomes problematic.[90] Moreover, derogation by the assisted state may not help if its domestic legislation does not permit internment and if it is powerless to order release from multi-national detention.[91] Indeed, Francoise Hampson points out that in General Comment 29 the Human Rights Committee indicates that potentially derogable rights have a non-derogable core, and suggests that in the context of internment operations, human rights bodies will likely treat the right to challenge the lawfulness of detention contained within the general prohibition as being non-derogable.[92] Many of these issues, which are complex, practical and arise in real operations, stem from the attempt to force the application of human rights regimes into circumstances for which they were not designed. The better view is undoubtedly that it is the law of armed conflict that provides an intrinsic power to intern, that the body of law is incomplete[93] in that it fails to address the grounds for such detention and the associated review and other procedures that should be applied, and that this defect should be rectified either by treaty law provision or by other arrangements having the character of law.[94]

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[89] Pejic 2012, p. 90. Such a derogation would also be required to permit internment, that is non-criminal detention operations, in an extra-territorial armed conflict unless a binding resolution of the UN Security Council requires states to undertake such internment operations; *Al-Jedda*, n. 83 above. Note that where particular human rights treaties do not permit derogation, the impact of human rights law on the law of armed conflict in this regard will be uncertain; Pejic 2012, p. 90.

[90] Francoise Hampson agrees that the permitted grounds for detention under Article 5 of the European Convention are listed exhaustively and do not include administrative detention, that a European state planning on such detention operations would therefore need to derogate and that there is at present no case law on whether a state can derogate with regard to an emergency in another state; Hampson 2012, p. 275.

[91] A potential solution to this difficulty would be for the state in question to rely on the customary law power to detain during non-international armed conflicts and to specify the grounds on which such detention may be ordered in domestic legislative provision.

[92] Hampson 2008, p. 563 where it is suggested that long periods of detention before being brought before a judicial officer will also likely be seen as facilitating ill-treatment when a derogation provision is assessed. This may not necessarily require that a habeas corpus procedure be applied provided that there is some suitable review of the lawfulness of the detention; correspondence between the author and Francoise Hampson.

[93] Consider Hampson 2012, pp. 275–276.

[94] Pejic 2012, p. 94. As Francoise Hampson has pointed out in correspondence with the author, the failure of the law of armed conflict to address these issues is attributable to the assumption that domestic law would contain suitable provision. It was not that extra-territorial non-international armed conflicts were explicitly excluded from the legal arrangements but, rather, that such conflicts were not considered. For an outline of the sorts of arrangement that might be considered by states in this regard, see Pejic 2005 and Annex I to ICRC Report on International Humanitarian

8.5.3 Transfer of Internees

The transfer of internees between Detaining Powers raises complex law of armed conflict and human rights law issues. International law prohibits the transfer of detainees between states if substantial grounds exist to believe that there is a real risk that as a result of the transfer the detainee will suffer certain detriments, including torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life and, depending on the circumstances, persecution on certain grounds; this is known as the non-refoulement principle. It is reflected in the law of international armed conflict in Article 12(2) of Geneva Convention III and in Article 45(3) and (4) of Geneva Convention IV.

While there is no specific law of armed conflict provision on non-refoulement in relation to non-international armed conflict, Jelena Pejic speculates that the logic of Common Article 3 is that states cannot circumvent their treaty obligations by transferring an internee to a state that will not respect the obligations of that Article.[95] Transfers that do not involve the crossing of borders raise difficult legal issues. Multi-national forces that are operating in a country may for understandable reasons wish to transfer prisoners into the custody of the host nation soon after arrest and in order to facilitate the early application of host nation jurisdiction. Where the human rights record of the receiving, host state is not good, diplomatic assurances may be sought, and given, as to the future handling of the relevant individual. Indications that such assurances will not be properly implemented are likely to call into question whether such assurances will protect the transferring state against accusations that the transfer was improper. There are difficult issues here. The transferring state will need to be able to show that it has acted in good faith and has taken all reasonable steps. While delaying transfer or transferring the individual to a third state whose proper conduct is not in question may be alternative approaches, awkward circumstances are likely to arise from time to time, for example when a multi-national force is withdrawing and needs to transfer detainees before doing so.[96]

(Footnote 94 continued)
Law and the Challenges of Contemporary Armed Conflicts, submitted to 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, available at www.icrc.org/eng/resources/documents/misc/ihl-30-international-conference-101207.htm. Consider also the Copenhagen Process Principles and Guidelines referred to later in this chapter. See also Interim Standard Operating Procedures on Detention in United Nations Peace Operations, UN Department of Peacekeeping Operations, Department of Field Support (2010) 2010.6.

[95] Pejic 2012, p. 99. Human rights law treaty provision may also contain explicit non-refoulement provision, such as Convention against Torture, Article 3, or such provision may be implied.

[96] Consider for example the failure of the Afghan authorities properly to implement their international law obligations in relation to detainees and the resulting problems posed for coalition states which could not therefore transfer detainees to the territorial authorities; Hampson 2012, p. 273. Consider also the Memorandum of Understanding arrangements under which legal control of criminal suspects held by the US contingent of the Multi-National Force—Iraq was

8.6 Detainees in Internal Security Situations

If a person is detained by the authorities of a state during riots, internal disturbances, tensions, terrorist and other criminal events not amounting to an armed conflict, the domestic law of the state and human rights law will apply. If an armed conflict has come to an end and either there is no belligerent occupation or any such occupation has also ceased, domestic law and human rights law will also apply. The applicable domestic and human rights law will consist of:

- domestic and human rights law applying in the state where the detention operations are occurring; and
- if personnel belonging, for example, to the armed forces of another state are assisting the territorial state, the domestic law (including military law) of the sending state plus, to the extent that they have extra-territorial effect, the human rights law norms that bind that sending state's armed forces.[97]

Accordingly, the assisting state may be bound by the international law, including human rights, obligations of the host state so if derogation is considered necessary, this would need to be done by the host state in the first instance. The assisting state may then seek to rely on that derogation, for example, before the Human Rights Committee, or it may seek to derogate itself, for example, if bound by the European Convention.[98]

(Footnote 96 continued)
transferred to the Iraqis while the individuals remained under the physical control of US Forces, such transfer being deemed to constitute release of the relevant individuals from prisoner of war captivity; Wall 2007, pp. 417–418. See in particular Case of *Al Saadoon and Mufdhi v. United Kingdom*, ECtHR Application Number 61498/08, Judgment of 2 March 2010 in which the decision to transfer to Iraqi authorities an individual facing a charge capable of punishment with death was found to breach Article 3 of the European Convention. Note arrangements made by the UK to establish Detention Oversight Teams, the purpose of which is to seek to ensure appropriate treatment of prisoners transferred to Afghan custody; para 71 of Written Evidence of the Foreign and Commonwealth Office to the UK House of Commons Foreign Affairs Select Committee dated 6 October 2010, available at www.publications.parliament.uk/pa/cm201011/cmselect/cmfaff/514/514we02.htm.

[97] The UN Security Council Chapter VII Resolution 1546 of 2004 dated 13 June 2004 granted the Multi-national Force in Iraq authority to take all necessary measures to contribute to the maintenance of security, etc. in accordance with annexed letters from, respectively, US Secretary of State Colin Powell and President of the Iraqi Interim Government, Ayad Allawi. Colin Powell's letter summarized the tasks of the Multi-national Force to include "internment where this is necessary for imperative reasons of security" and President Allawi's reply asked the Security Council to mandate the tasks as set out in that letter. As Andru Wall concludes, "[t]hus, the detention or internment of civilians, grounded in the customary law of armed conflict, received the blessings of a Security Council Chapter VII mandate"; Wall 2007, p. 429. The tricky issue for states party to the European Convention is the relationship between an essentially permissive authorization such as this and the prescriptive obligations in the European Convention.

[98] Discussed in correspondence between the author and Francoise Hampson.

Derogation from Article 5, as we shall see in Chap. 9, is only permissible "[i]n time of war or other public emergency threatening the life of the nation".[99] Article 5 of the European Convention gives an exhaustive list of the grounds on which a person can lawfully be detained. These permitted grounds include pending criminal proceedings but do not include internment.

The European Court case of *Lawless* shows that it will only be lawful for a State party to the European Convention to undertake preventive detention if the State derogates in suitable terms and if the detention is shown to be necessary.[100] On the other hand, although there must be some evidence to support a reasonable suspicion and, thus, to justify an arrest, judgment of the reasonableness of a suspicion justifying the arrest of those suspected of terrorism cannot always accord with the standards applied in dealing with conventional crime and "Article 5(1)(c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter" organized terrorism.[101] Informed commentators have concluded that "the Court has acknowledged the relevance of exceptional circumstances of disorder to the interpretation of Articles 5 and 6, although it has been generally reluctant to give decisive weight to them given the importance of the (non-derogated from) right at stake".[102]

Put simply, therefore, preventive detention is contrary to Article 5 of the European Convention, and derogation from that right is only permissible to the extent strictly required by the exigencies of a situation that constitutes a public emergency threatening the life of the derogating nation.[103] While the derogating state is peculiarly placed to make that determination, and while it will likely be given a margin of appreciation in doing so, good faith is required. The view has been expressed that "[w]here there is an organized campaign of violence resulting in deaths at relatively low level among the security forces and civilians it remains hard to see how the Court could avoid confirming a state's claim that there is a public emergency within Article 15 assuming there is no evidence of bad faith on the latter's part". Nevertheless, it will be for a court to decide the matter applying an appropriate margin of appreciation. While a derogation for a lengthy period will not necessarily be condemned, the court will in such circumstances wish to be

[99] European Convention, Article 15(1).

[100] *Lawless v. Ireland*, A 3 (1961), 1 EHRR 15 para 15.

[101] *Fox, Campbell and Hartley v. UK*, A 182 (1990); 13 EHRR 157 at paras 32 and 34 but see *Murray v. UK*, A 300-A (1994); 19 EHRR 193 at para 58. As to the striking of a proper balance between procedural justice and national security concerns, see *Chahal v. UK*, 1996-V; 23 EHRR 413 GC at para 131.

[102] Harris et al. 2009, pp. 622–623.

[103] To date, there has been no derogation made on the basis of a threat to the life of an assisted nation. The reference in Article 15 of the European Convention to 'the Nation' suggests that it is the life of the nation that is party to the European Convention that must be in peril, but there is no known authority on the point.

satisfied as to the sufficiency and effectiveness of domestic safeguards to ensure the emergency is not indefinite.[104]

However, where a criminal investigation and subsequent proceedings are involved, arrest, detention before trial and detention pursuant to a sentence of a properly constituted court will be permitted under Article 5 to the extent that they comply with the requirements of the Article.[105]

8.7 Future War and Detainee Operations

Having examined the legal framework that applies to detention operations in the current spectrum of conflict, we should ask ourselves how the possible developments that we have been discussing in this book are likely to influence, and be influenced by, those arrangements.

If Article 1(4) of API were to cease to apply to the armed conflicts to which it currently refers, they would as previously noted, revert to being classed as non-international armed conflicts in which, therefore, there would be no combatant status, no combatant immunity and thus no prisoner of war status on capture. All internees in such conflicts would be subject to the legal arrangements discussed in Sect. 8.5.2. The suggested merger of Common Article 3 and APII conflicts might of course occur in the context of the negotiation of more comprehensive treaty arrangements to be applied to both of them. Such a negotiation seems, however, unlikely to occur, and may indeed be undesirable if it would put at risk the hard-won international law that we do have to protect victims of non-international armed conflicts, including internees.

It appears unlikely that the difficulties caused for states by some applications of human rights law, or caused, at least, by some applications of some human rights treaty provisions, will cause significant reinterpretation of those provisions and of any relevant derogation arrangements. In Chaps. 9 and 10 the author suggests action that states might choose to take to seek to clarify the application of the law of armed conflict in its role as lex specialis. It is not necessary to repeat those suggestions here.

Cyber operations are liable to be conducted from within zones controlled by the cyber actor's own party to the conflict. Detention of such cyber actors is only therefore likely to be a consideration in the event that close action cyber activities are being undertaken by someone who is apprehended in the act, or if persons who have undertaken cyber operations are in territory that is over-run and occupied by the adverse party. The determination of the captured individual's status as a combatant or civilian will be according to the same processes and criteria as are

[104] Harris et al. 2009, p. 631. See the Greek Case, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report of 5 November 1960, in the Yearbook of the European Convention on Human Rights, vol 12, 1969, p. 73.

[105] See *Lawless v. Ireland*, n. 100 above, at para 14 where the detention was not considered to have been for the purposes of initiating a criminal prosecution.

applied to other captured individuals. However, the sometimes complex, sometimes covert nature of cyber activities may render it difficult to determine whether the captured individual has been participating directly in the hostilities. Indeed it is highly likely that some individuals who have so participated will remain undetected by an occupying or capturing Power.

Detaining Powers are always anxious to ensure the security of the internment facilities in which internees are held. Maintaining that security is likely to be inconsistent with the continued possession by internees of mobile telephones, smartphones, laptops, ipads and similar devices. While internees must be permitted to communicate with the outside to the extent provided for in the Conventions and Protocols,[106] the Detaining Power does have some rights where its security is concerned. Thus, under Geneva Convention IV,

> where in occupied territory an individual protected person is detained as a spy or saboteur, under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the […] Convention.[107]

Article 45(3) of API stipulates that in occupied territory, any person who has taken part in hostilities and who is not entitled to prisoner of war status, unless held as a spy, is, notwithstanding Article 5 of Geneva Convention IV, entitled to his rights of communication under that Convention. So, for states party to API, persons detained as saboteurs or detainees who are definitely suspected of activity that is hostile to the Occupying Power and who are not entitled to prisoner of war status and therefore are civilians, must nevertheless be given full rights of communication as set out in Geneva Convention IV. This is the provision that is liable to render the maintenance of security for the occupying power somewhat challenging. It is also a provision that may be somewhat difficult to rationalize with more modern information gathering methods. Thus, as we have seen, information of military value can be gathered remotely using cyber methods. Such activities do not constitute espionage, or spying, because the person undertaking the activity never enters "the zone of operations of a belligerent".[108] The rhetorical question to be posed is whether it is realistic to require the occupying power to permit full communications rights under Geneva Convention IV to internees who, for example, have been involved in sabotage or remote information gathering.

The more widespread incidence of direct participation by civilians in hostilities, for example, through the activities of private military and security companies, discussed more fully in Chap. 7, would suggest that in future international armed conflicts greater numbers of those taken prisoner will be civilians who are liable to

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[106] As to rights of internees and of retained persons in respect of correspondence, see for example, Geneva Convention I, Article 28(2)(b), Geneva Convention III, Articles 33(2)(b), 35, 71, 76(3), 98(5), 103(3), 108(3), Geneva Convention IV, Articles 25(1), 93(2), 107, 112(3), 125(3) and (4) and 128(3).

[107] Geneva Convention IV, Article 5(2).

[108] See the definition of espionage in Hague Regulations, 1907, Article 29.

be tried for hostile activities undertaken without the protection of combatant immunity. Similarly, the increasing proportion of armed conflicts that are non-international in nature would again suggest that significant numbers of those interned will have committed breaches of the applicable domestic law. Not all such cases will give rise to prosecution. Moreover, the accomplishment of peace and reconciliation may require the granting of amnesties along the lines provided for in APII[109] or the establishment of truth and reconciliation commission-type arrangements of the sort implemented following the termination of apartheid pursuant to South Africa's Promotion of National Unity and Reconciliation Act, No. 34 of 1995 and thereafter applied to the circumstances of other countries.[110]

The differing roles of people in future conflicts, the complex nature of their involvement and the controversy that exists among international law scholars as to the interpretation of the notion of direct participation in hostilities[111] suggest that determining the status of internees in future conflicts is likely to become a difficult business.

In the past, most detainees apprehended on the battlefield wore the uniform, held the weapons, carried the identification cards, possessed the 'dog tags' or had some other identifying feature of the armed force to which they belonged. Civilians also were frequently, though not always, distinguishable, such that the doubt to be resolved at Article 5 tribunals did not routinely arise. More recently, doubt arises frequently, and the individual concerned may be expected to argue the point vigorously. While Jelena Pejic is undoubtedly right in her appreciation of Article 5 tribunals as not determining civil rights within the meaning of Article 6 of the European Convention, one rather wonders whether a final determination of that status with a view to deciding issues of long-term detention will indeed be subject to Article 5 and 6, ECHR rights and procedures; if that is to be the case, there are liable to be serious practical, evidential and logistical issues that it will be difficult for states to resolve. It will be vital that decisions of International Courts recognize the unavoidable practical constraints faced by states in times of armed conflict.

Situations in which individual nations, coalitions or alliances are engaged in military operations in third states, for example to help to quell insurrections and bring peace and stability to troubled regions, will necessarily involve the arrest and detention of members of the adverse party to the conflict. The states in which such operations are undertaken will not always have the most sophisticated legislation addressing the rights of detainees in the custody of the national authorities, nor, perhaps, the best of records in respecting the fundamental rights of such persons. The

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[109] APII, Article 6(5).

[110] See the Commission Website at www.justice.gov.za/trc/. For examples of other such Commissions, consider for example the Truth and Reconciliation Commission of Liberia (see the Final Report of the Commission dated 3 December 2009, available at http://trcofliberia.org) and the Peruvian Truth and Reconciliation Commission, see the Final report dated 28 April 2003 and available at www.cverdad.org.pe/ingles/pagina01.php.

[111] See the ICRC Interpretive Guidance, Melzer 2009 and the associated discussion in New York Journal of International Law and Politics, vol 42 (2010), both of which are considered in Chap. 7.

decision of the assisting states to contribute scarce and valuable resources to such operations will inevitably in part be prompted by national self-interest, for example, a recognition that stability in the region accords with the best interests of the intervening states. There will also, however, be additional somewhat more altruistic motives at work. The calculus over whether to participate will often be heavily influenced by predictions as to the scale of the human and other cost and as to the duration of the anticipated involvement. If the interpretation of non-refoulement principles renders it impossible for assisting states to transfer detainees locally, thus prolonging the period of engagement in the operation, this may have an impact on the decision to become involved in the first place. It follows from this that assisting states should consider providing assistance to the prison and police services of the host state as part of the package of assistance that is usually provided to develop the domestic institutions of the assisted state. One or more assisting states, by working alongside the local prison and police personnel in this way, can help to create and maintain conditions which will make it safe to transfer detainees to local jurisdiction.

Self-evidently, in asymmetric warfare, if the asymmetrically inferior party has engaged in unlawful activity in order to seek to counter the superior position of his opponent, the persons involved in that activity will be liable to trial and to punishment if convicted. Similarly, if persons fighting on behalf of the asymmetrically inferior party have civilian status while doing so and are then captured, they are liable to prosecution for all hostile acts, irrespective of whether those attacks comply with targeting law. The safeguards in Article 75 of API must, as a minimum, be applied to any such proceedings. If the unlawful activity takes the form of grave breaches of the Conventions or of API, or if it consists of equivalent war crimes committed in the context of a non-international armed conflict, states are under an obligation to search for persons who have committed or ordered to be committed such grave breaches and must bring them, regardless of nationality, before their national courts.[112]

Simplistically, the depersonalization of warfare and remote attack techniques will reduce the likelihood of individuals being captured by the adverse party and may, in the longer term, erode the utility of some detention operations, in that the robots may be able to continue the fight irrespective of the detention of the persons who designed them or initiated their operations. A party to an armed conflict in which the enemy is using such advanced technology may be expected to be particularly keen to locate and apprehend the scientists who developed the technology with a view to learning its vulnerabilities.[113] We have already discussed the

[112] See Geneva Convention I, Article 49(2), Geneva Convention II, Article 50(2), Geneva Convention III, Article 129(2), Geneva Convention IV, Article 146(2) and see API, Article 86(1). As to complementarity under the Rome Statute of the International Criminal Court, consider Article 17 of that Statute.

[113] In that regard, and in the unlikely event that the scientists or development engineers are members of the armed forces and thus combatants entitled to prisoner of war status, or that they have prisoner of war status on some other ground under Geneva Convention III Article 4, that Convention imposes limits on the questioning of such persons. Under Article 17 of Geneva

treatment of civilians in the hands of an adverse party to an international and, respectively, non-international armed conflict. Those general principles and rules, supplemented by other provisions, will also limit the manner in which questioning of any such persons by the adverse party to the conflict is conducted.[114]

Detention operations will in future be undertaken in the 'spotlight' of mass and personal media coverage, and of differing forms of litigation to which we refer in Chap. 11. Deprivations of liberty during future military operations, whether these are associated with armed conflicts or internal security operations falling below the armed conflict threshold, and whether the apprehension and internment are undertaken by organs of a state such as members of the armed forces or by other personnel acting on the instructions of a state, are likely to be the subject of frequent and vigorous legal challenge. In this regard, the tendency to challenge decisions by those placed in authority, a tendency that is manifest in many other fields of human activity, seems likely to be felt in all aspects of detention operations. The only way to seek to mitigate the considerable inconvenience and cost associated with such challenges is to ensure that all procedures associated with internment are transparent, that decision-making is rigorously objective, that the procedural rules are clear and widely understood particularly by those whose task it is to implement them and to seek to ensure that all such operations are undertaken fairly and in strict compliance with all rules of the law of armed conflict.

Different aspects of the 'spotlight' may, as we shall see in Chap. 11, feed on one another. Thus, a challenge before the High Court may be expected to prompt media coverage which in turn calls into question whether the armed forces, for

(Footnote 113 continued)
Convention III every PW is bound, when questioned on the subject, to give only his surname, first names and rank, date of birth and service number or equivalent information; Article 17(1). While they can be asked to provide all such technical information for the assistance of the capturing state, "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever". Geneva Convention III, Article 17(4). PWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind; ibid. As Tony Rogers makes clear, it is perfectly legitimate to interrogate prisoners of war to obtain valuable intelligence from them, but under Article 17 of Geneva Convention III they are not obliged to give answers beyond the mandatory information as to name, rank, number and date of birth and no torture, coercion, threats, insults or unpleasant or disadvantageous treatment may be used to secure information from them; Rogers 2002, reproduced in part in Rogers 2012, p. 63. Note also Article 1 of the Convention against Torture, adopted by the General Assembly of the United Nations on 10 December 1984 at Resolution 39/46. Offering favourable inducements to motivate the provision of information is not, however, prohibited. For an account of interrogation methods employed by the United States during the 'War on Terror', see Corn et al. 2012, pp. 343–351.

[114] Note Jelena Pejic's view that "internment may not be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is deemed to represent a serious security threat based on his or her own activity"; Pejic 2012, p. 95. Past activities of, say, development engineers may, perhaps, not constitute an ongoing security threat of the sort Jelena Pejic seems to have had in mind. The prohibition against torture will apply, as will the obligations set out in Geneva Convention IV, including for example in Articles 27–34. See also Dörmann 2012, pp. 356–357.

example, are applying the law properly in an armed conflict, with the inevitable potential consequence that support for military action may diminish. Accurate and thorough dissemination of the legal rules, accurate and thorough legal advice to commanders under Article 82 of API, regular and thorough training of all military personnel in the rules, the maintenance of a properly disciplined force, the institution of timely and thorough investigations of all allegations of wrongdoing, trial and punishment of offenders where offences are disclosed and timely and appropriate action to prevent recurrence are among the practical steps that are necessary if states are to be confident that the law is being complied with and if media coverage, and public opinion, are to remain supportive. But all involved must act in good faith, including those contributing to all forms of the media, those taking legal action, those advising those contemplating and/or undertaking legal action and those judging these matters in whatever forum. We should seek to avoid the unedifying spectacle of states that are seeking to comply with the law being taken to task by tribunals that never seem to get to challenge their opponents whose actions routinely breach the law in the most egregious ways.

8.8 Copenhagen Process Principles and Guidelines

Between 11 October 2007 and 19 October 2012 representatives of a number of states met as part of the Copenhagen Process on the Handling of Detainees in International Military Operations, with representatives of certain other international bodies in attendance. The aim was to develop principles to guide the implementation of existing legal norms in relation to detention during international military operations and by facilitating a common approach, to foster humane treatment of detainees and the effectiveness of such operations.[115]

Taking as their starting point a recognition that detention is a necessary, lawful and legitimate way of achieving military objectives, the Principles and Guidelines that were adopted by the Process in 2012 address detention in the course of non-international armed conflicts and peace operations. They do not address detention in the course of international armed conflicts.[116] The Principles and Guidelines do not have the status of law as such, but constitute the approach that was agreed by the international expert group that participated in the Process.

Bruce Oswald and Thomas Winkler note that the Process was state-led, involved three conferences, an expert meeting, consultations and negotiations and briefings with states, international organizations (attending as observers) and civil society. They comment that the "Principles and Guidelines do not seek to create

[115] The Copenhagen Process on the Handling of Detainees in International Military Operations, Principles and Guidelines, available at http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf (Copenhagen Process Principles and Guidelines), Introductory Paras I and II.

[116] Copenhagen Process Principles and Guidelines, Introductory paras III and IX.

new legal obligations but to guide the implementation of existing obligations by facilitating a common approach to address the humane treatment of detainees while ensuring the effectiveness of international military operations." Acknowledging that they are not intended to be the final word on detention matters, Oswald and Winkler suggest that the work undertaken in developing them will influence future discussions or developments concerning detention.[117]

The Process has, however, been the subject of some criticism in the literature[118] which Oswald and Winkler have answered.[119] Jacques Hartmann criticizes the Principles and Guidelines on a number of grounds, including that they state the obvious or are too vague, that by stating that they apply to 'International Military Operations' and then not defining that term, their scope of application is uncertain, that some clauses seem trivial while important concepts such as the notion of promptness are not defined and that there is a general lack of detail and clarity. He concludes that the Process was an important initiative that should not end with the Principles and Guidelines,[120] a view that rather accords with Oswald and Winkler's view that the Principles and Guidelines are not the last word on these matters.[121]

Clearly, the Copenhagen Process is important because it involved 24 states including the five permanent members of the Security Council and included the ICRC as an observer. It tackled issues of great international law importance, and sets out the degree of agreement that could be achieved among those participating in the Process. While in an ideal world we would have comprehensive provision expressed in clear, detailed terms that cannot always be achieved in international negotiations. It would not be either appropriate or sensible to dismiss the process because of perceived limitations in the language that it produced. Rather, accepting that the Principles and Guidelines are useful, it is suggested that they should provide a helpful basis on which states can build in developing their national doctrine and policies on these matters and can help to inform future developments in the international law of detention operations.

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[117] Oswald and Winkler 2012.

[118] Amnesty International, Copenhagen 'Principles' on Military Detainees Undermine Human Rights, 22 October 2012, available at www.amnesty.org/en/news/copenhagen-principles-military-detainees-undermine-human-rights-2012-10-22. See also Brannagan 2010, p. 505.

[119] Oswald and Winkler 2012 and see comments by Bellinger 2012, www.lawfareblog.com/2012/12/completion-of-copenhagen-process-principles-and-guidelines-on-detainees-in-international-military-operations/.

[120] Hartmann 2012, available at www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/.

[121] But note Horowitz 2012, where it is concluded that it was significant that the five permanent members of the Security Council and other states recognized that gaps in detention law exist and that it would be useful to discuss ways of overcoming associated problems; it is similarly significant that after five years of discussion states were unable to find sufficient common ground to bring the necessary specificity to robust and agreed detainee handling procedures. For an assertion of the usefulness of the Copenhagen Process, see Winkler 2009.

8.9 Conclusions

The focus of this chapter has been on the law that applies to detention operations undertaken in the course of all conflicts that are reflected in the legal spectrum of conflict discussed in Chap. 2. We have looked at the provisions of the law of armed conflict and of human rights law, noting the circumstances in which each body of law is of greatest significance. We have also noted the Principles and Guidelines developed by the participants in the Copenhagen Process. To the extent that there are gaps and ambiguities in the law, it would obviously be useful if states were to develop mutual understandings, whether through the Copenhagen Process or otherwise, with a view to clarifying the rules on these matters.

However, as noted at the beginning of this chapter, mistreatment during an international or non-international armed conflict of prisoners or of internees is a breach of the domestic criminal law, of the law of armed conflict and of applicable human rights law and such breaches should be repressed as required by the Conventions, by the Additional Protocol and, it is suggested, in the case of non-international armed conflicts, by customary law.[122]

As we noted at the beginning of the chapter, internees have in recent armed conflicts been subjected to outrageous treatment that on any assessment constitutes serious criminal activity. Murder, mutilation, indecent assault, torture, inhuman and degrading treatment of persons in the power of an adverse Party are, according to any moral compass, clearly prohibited and must be condemned. While it is right and proper that all conduct that breaches the rules of law that protect persons in this vulnerable situation must be promptly and efficiently investigated and repressed, the prime focus of action should be directed towards those who routinely and deliberately breach these principles and rules in the most serious ways.[123] Bringing the perpetrators of such abuses to justice and doing everything practically possible to prevent such breaches must be the proper priority and, as non-State actors are not bound by human rights treaty law, bringing them to account will necessarily involve the application of the law of armed conflict. Disputes as to which body of law applies in particular circumstances are not helpful in this regard. Anything that might cause some to be, or to claim to be, confused as to the applicable rules should be avoided.

The ICRC has recently drawn attention to the need to update the law of armed conflict, particularly with regard to procedural safeguards in connection with

[122] Consider Articles 1 and 3 common to the Geneva Conventions 1949, ICRC Customary Law Study, pp. 590–597 and Rome Statute 1998, Article 8(2)(c).

[123] There are depressingly numerous examples, but consider generally Arimatsu 2012, pp. 155–156. For a further example, consider the abuses and killings of detainees in 2001 in Afghanistan reported in Human Rights Watch World Report 2003, Afghanistan, available at www.hrw.org/legacy/wr2k3/asia1.html.

internment in non-international armed conflicts.[124] Of general relevance in this regard is the work, referred to earlier in this chapter, currently being undertaken by the Human Rights Committee to update its General Comment on Article 9 of the International Covenant. It is, however, appreciated that other initiatives in the human rights sphere may address the human rights rules as to detention. Any proposals for changes in such rules should recognize that armed forces personnel and parties to the conflict must of necessity undertake detention operations during periods of both international and non-international armed conflict. Ideally, any human rights detention rules that are agreed should explicitly exclude armed forces detention operations during international and non-international armed conflicts. If that, however, cannot be agreed, the particular and complex circumstances relevant to an armed conflict will need to be taken fully into account in determining which specific rules must apply to those circumstances, and in expressing exactly how the rules are to be adapted so as to be practically operable by those with the responsibility to do so. It is, in addition, to be hoped that necessary improvements to the law of armed conflict arrangements on detention will be developed and implemented with the minimum of delay.

From this specific consideration of the legal aspects of detention operations we now lift the focus somewhat in order to consider the general relationship between the law of armed conflict and international human rights law. In Chap. 9 we consider the controversy surrounding that relationship, taking note of the views of commentators and the relevant judgments of international courts. Then, in Chap. 10, we articulate and reflect on an interpretation of that relationship that might render it somewhat more harmonious.

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[124] ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 18. See also Daniel Thürer's contention that new treaty rules should be developed to deal with material conditions of detention; Thürer 2011, p. 144.

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Chapter 9
The Law of Armed Conflict and Human Rights Law

Contents

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_9,

9.1 Introduction

In this chapter, we shift the focus somewhat to consider the relevance and applicability of human rights law in situations of conflict, i.e. to situations of armed conflict including belligerent occupation and to internal security situations that fall below the armed conflict threshold.[1] We start by considering the application of human rights law across this spectrum, noting the decisions of international courts that have addressed the inter-relationship between human rights law and the law of armed conflict. In later Sections we note how that inter-relationship applies to certain activities and the relevance of particular human rights to armed conflict. After considering which general factors might determine which body of law should apply, we briefly consider a variety of human rights regimes. The discussion then continues in Chap. 10 where we seek to suggest a practical approach to the frictions we identify in the relationship between international humanitarian law and human rights law.

9.2 Application of Human Rights Law

It is the purpose of this section to explain in brief terms how human rights law applies first in the case of peacetime, including when force is used that falls below the armed conflict threshold, and second in the case of armed conflict, whether that conflict be international or non-international in nature. This can, of necessity, only be a somewhat cursory treatment of what is a complex and lengthy topic. We shall conduct much of the discussion by reference to the European Convention on Human Rights and to the decisions of the International Court of Justice and of the European Court of Human Rights. It should, however, be borne in mind that the European Convention does not address the limitations on the rights to life and to liberty in the same way as the International Covenant on Civil and Political Rights,[2] the African Charter on Human and Peoples' Rights[3] and the American Convention on Human Rights.[4] Articles 2 and 5 of the European Convention list exhaustively the circumstances in which deprivation of life or liberty are not contrary to the Convention with the consequence that a derogation under the Convention, Article 15, is essential to displace the application of the Convention. The International Covenant, African Charter and American Convention by contrast refer simply to a prohibition of arbitrary deprivation of life or liberty and what is arbitrary in peacetime may not be arbitrary in time of armed conflict.

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[1] As Geoff Corn has stated, one of the most contentious contemporary debates concerns the relationship between the law of armed conflict and international human rights law; Corn 2010, p. 53.

[2] See International Covenant on Civil and Political Rights, Articles 6(1) and 9(1).

[3] See African Charter on Human and Peoples' Rights, Articles 4 and 6.

[4] See American Convention on Human Rights, Articles 4(1) and 7(3).

9.2.1 Human Rights Law in Peacetime

Peacetime for the purposes of this discussion includes situations in which crimes, riots, terrorist acts, looting, hostage taking and other forms of civil unrest constituting breaches of the criminal law occur.[5] The law of armed conflict does not apply, because there is no armed conflict in existence, so the actions of the state security authorities, police forces and armed forces in dealing with events of this nature are regulated by the ordinary domestic criminal and security law applying in the state in question, as supplemented by human rights law.[6] Human rights law is fundamentally concerned with the position of the individual in relation to the power wielded by the state, and Article 1 of the European Convention, for example, obliges states party to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention.[7]

If human rights law provides greater protection for the citizen than domestic law would afford, the more exacting requirements of the human rights law standard must be complied with. So, for example, the UK domestic law[8] reasonableness criterion for what is lawful when preventing crime or apprehending offenders is exceeded by the human rights law tests of absolute necessity, planning,[9] care and proportionality that determine whether a use of lethal force breaches the right to life. Moreover, in times of peace, human rights law permits of no derogation in relation to the right to life, while under the European Convention derogation from other human rights is only permitted if the situation satisfies the criteria referred to in Article 15. That Article deals with derogation and states:

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[5] Melzer 2010, p. 280. Human rights law norms will also apply, with domestic law and to the exclusion of the law of armed conflict, in peace enforcement operations that fall short of armed conflict; see Garraway 2010, p. 129.

[6] As Terry Gill and Dieter Fleck put it, human rights law will in such circumstances serve as the sole or primary governing paradigm; Gill and Fleck 2010, p. 10. Ken Watkin usefully traces the evolution of human rights law from the nation state and the development of police and security forces. Noting the capacity of the state to integrate itself into and control the activities of its citizens, for example by means of eavesdropping, he comments that the level of state control and intervention raise issues of privacy and the potential for abuse so it is no coincidence that efforts to control the power of the state and its impact on citizens spawned human rights norms; Watkin 2004, p. 13.

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (European Convention or ECHR), Article 1.

[8] Criminal Law Act 1967, section 3.

[9] In the *McCann* judgment, the European Court made the point that "the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction…" In such circumstances the Court had to scrutinize, inter alia, whether the anti-terrorist operation was planned and controlled by the authorities so as to minimize as far as possible recourse to lethal force; *McCann v. UK*, A 324 (1995); 21 EHRR 97, paras 193 and 194 GC.

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Article 15(2) states: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para 1) and 7 shall be made under this provision.' Article 15(3) then requires a state making use of these derogation powers to inform the Secretary General of the Council of Europe of the measures it takes and the reasons for doing so and, similarly to notify when the measures have ceased to apply and that the Convention is again being fully applied.

Jann Kleffner identifies a number of restraints on the right to derogate under human rights law, namely: certain human rights are non-derogable; derogating measures must be limited to the extent strictly required by the exigencies of the situation; derogation measures must not be discriminatory on specified grounds; derogating measures must be consistent with other international law obligations; and there must be appropriate notification.[10]

The Human Rights Committee refers to Article 4 of the International Covenant on Civil and Political Rights in its General Comment 29, para 3 where it makes the point that:

> Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by Article 4, para 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in Articles 4 and 5, para 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by Article 4.[11]

Derogation measures must be limited to those strictly necessary to the exigencies of the situation, i.e. they must be strictly proportionate. There are also

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[10] Kleffner 2010, p. 68.

[11] See Human Rights Committee, General Comment 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 3. Note that in *Lawless v. Ireland*, a time of public emergency is stated to be "an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the State is composed"; *Lawless v. Ireland* (No 3) (1961) 1 EHRR 15 at p. 31. The European Commission on Human Rights found that the 'public emergency' must be actual or imminent, must affect the whole nation, must cause continued, organised life of the community to be threatened and the danger or crisis must be exceptional, in that normal measures or restrictions, permitted by the European Convention for the maintenance of public safety, health and order, are plainly inadequate; Karimova 2011, section (a), available at www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php.

requirements as to proclamation and notification, proportionality, consistency and discrimination.[12]

While most of these are substantive limitations, it is not clear whether the notification requirement is of a more procedural nature.[13] Moreover, Human Rights Committee General Comment 29 indicates that potentially derogable rights have a non-derogable core.[14] As Cordula Droege explains, the absence from a human rights treaty of reference to derogation during times of armed conflict does not mean that the treaty does not apply during such times.[15]

The effect of all this is that under UK law, use of lethal force to tackle internal security operations must be both reasonable under Section 3 of the Criminal Law Act 1967 and must be absolutely necessary and strictly proportionate under Article 2 of the European Convention.

Article 2 of the European Convention addresses the right to life in the following terms: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

This duty to protect life involves, in particular circumstances, a requirement to take preventive measures.[16] The combined effect of Article 1 and of the right to life is that 'the obligation in Article 2 to protect the right to life also imposes a procedural obligation on the state to investigate deaths whether they occur at the hands of state agents, private persons or persons unknown.[17] The obligation extends beyond violent deaths to all cases of death other than from natural causes'[18] and the obligation is to conduct a thorough investigation into all of the relevant circumstances pertaining to the incident giving rise to the death(s).[19]

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[12] See Karimova 2011, sections (b), (c), (d) and (f) respectively.

[13] See *Lawless v. Ireland*, n. 11, para 47.

[14] Hampson 2008, p. 563.

[15] Droege 2007, p. 320.

[16] See *Osman v. UK*, 29 EHRR 245, paras 115 and 116.

[17] Consider for example the ECtHR case of *McKerr v. the United Kingdom*, 34 EHRR 553, 599, para 111.

[18] Harris et al. 2009, p. 48. Investigations in the UK may take the form of:

(a) A police investigation, whether by armed forces or civilian police agencies.
(b) A Service Inquiry under the Armed Forces Act 2006, or some other military investigation. Such military investigations are likely to be directed at establishing a factually accurate assessment of what went wrong. The military interest lies in seeking to ensure that attacks successfully engage the intended target. There is little military utility to be derived, and potential strategic risk associated with, attacks that are misdirected.
(c) A Coroner's Inquest or similar investigation (such as a Fatal Accidents Act inquiry in Scotland). Domestic law of other states is likely to prescribe different forms of investigation. The form of investigation that is to take place will be determined according to the law and practice in the relevant state, the requirements of the human rights treaties to which the state is party and maybe by reference to associated case law.

[19] The purpose of the investigation will be to determine whether the force used was appropriate to the circumstances. It should be possible to identify from it those responsible and should

The result is that planning by the civil, and perhaps military, authorities will be required to ensure that suitable arrangements are in place for post-incident investigations to be undertaken and to be appropriately resourced. Responses to riots, civil disturbances, terrorist incidents, criminal conduct and events of that kind must be carefully planned with all personnel involved in such response action being made fully aware of the limitations on the use of lethal force discussed in this and the next paragraph. The orders, instructions or guidance that are issued to such personnel must be carefully drafted and must accurately reflect the stringent requirements imposed by both domestic and human rights law. What is strictly proportionate and absolutely necessary will depend, inevitably, on the circumstances of the particular situation and on an objective appreciation of the practical options that are then available to the security personnel who are seeking to deal with it. Careful consideration and planning may not be feasible if a violent and dynamic situation is unfolding. However, if the general security situation is such that events of that nature ought to have been anticipated, a failure to make appropriate arrangements in advance, coupled with the use of lethal force in circumstances where lesser force would be appropriate, may constitute a breach of the right to life.

When responses to anticipated security situations are being undertaken, care will be required and all viable non-lethal options should be pursued. Only if the use of lethal force is the only viable way of addressing the situation should it be adopted. As indicated above, this can only be assessed by reference to the relevant circumstances. Once it is determined that lethal force is indeed the only viable option, i.e. that it is absolutely necessary, the amount of force used, the time period during which it is used and the locations where it is used must also be reduced to that which is absolutely necessary and objectively proportionate to the circumstances.

Article 2(2) of the European Convention adds:

(Footnote 19 continued)
support any punishment awarded. The investigators should be institutionally and practically independent of those potentially implicated, and should take into account surrounding features such as planning and the control of those involved in using the force; Watkin 2004, p. 20, *McKerr v. the United Kingdom*, 34 EHRR 553 [2001], 599, paras 112 and 113 and *McCann and others v. United Kingdom*, 21 EHRR 97 [1995], 101 para 150. Noting the requirements as to public scrutiny such as to ensure practical accountability and the need for next of kin and victims to be involved so as to safeguard their interests, Ken Watkin observes that even a multi-layered process may not achieve the required standards of independence and transparency and concludes that "[a]pplied to its full effect, the human rights accountability framework demands the commitment of significant state resources and an exhaustive review of each use of deadly force"; Watkin 2004. Note also that ''Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure''; *Kaya v. Turkey*, European Court of Human Rights, Application Number 225335/93, Judgment of 28 March 2000, para 124.

> Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) In defence of any person from unlawful violence;
> (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) In action lawfully taken for the purpose of quelling a riot or insurrection.

So the use of lethal force to prevent the commission of an offence such as is referred to in section 3 of the Criminal Law Act 1967 comes within this exclusion if:

- in relation to (a), the offence that is prevented is one of unlawful violence and the action taken to prevent it has the effect, as it usually would, of defending the prospective victim;
- in relation to (b), if the person whose arrest is to be effected or whose escape is to be prevented would, in the absence of such action, be likely to commit an offence; and
- in relation to (c), because lawful action to quell a riot or insurrection is, normally, also stopping the commission of an offence of a continuing nature.
- It will be for the state using the force to show, if it is challenged, that the force used was absolutely necessary,[20] and this can only be so if it is strictly proportionate to the achievement of a permitted purpose.[21]

The limitations that Article 2(2) places on the right to life will be construed narrowly[22] and it will be for the Court objectively to assess whether the force used was strictly proportionate.[23] This is because the use of force will only be lawful if it is strictly proportionate to the achievement of its self-defence purpose.[24] The strict proportionality requirement applies to the actions of the state agents using the force as well as the decisions of those who plan and command the

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[20] *McCann and others v. UK*, Application No 18984/91, Judgment of 27 September 1995; 21 EHRR 97 para 148.

[21] *McCann v. UK*, n. 20 above, para 149. Nils Melzer discusses the application of these principles to killings. He finds that "[o]utside the conduct of hostilities in armed conflict, a targeted killing can be permissible only in very exceptional circumstances, namely where it cumulatively: (a) aims at preventing an unlawful attack by the targeted person on human life; (b) is absolutely necessary for the achievement of this purpose; (c) is the result of an operation which is planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force. States have a duty to regulate the use of lethal force by their agents in accordance with these standards"; Melzer 2010, p. 281; consider also 'Statement by Professor Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', United Nations Human Rights Council Geneva, 3 June 2009, available at www.un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf.

[22] *Andronicou and Constantinou v. Cyprus*, European Court of Human Rights, Application No. 25052/94, Judgment of 9 October 1997.

[23] Harris et al. 2009, p. 62.

[24] See *McCann v. UK* n. 20, para 212; *Isayeva, Yusupova and Bazayeva v. Russia*, 41 EHRR 847 (2005), paras 190, 191 and 200; see also Harris et al. 2009, pp. 61–64.

operation. It follows from this that the possibilities of giving a verbal warning or of firing a warning shot should be considered, depending on the relevant circumstances.[25]

The criticality of the care with which planning is undertaken,[26] with which the proportionality of the planned action is considered and with which the consequences that can be foreseen are assessed cannot be over-stated. In other words, if loss of life results from the use by the state authorities of disproportionate force in an unplanned operation, this is likely to constitute a breach of the right to life.[27]

In the same way that human rights law applies fully in peacetime, it also applies in conjunction with relevant domestic law during peace operations if the activities of the parties to the former conflict fall below the armed conflict threshold. If, however, a peace operation is undertaken in circumstances of ongoing armed conflict, i.e. a peace enforcement operation, the application of the law of armed conflict and of human rights law as between the parties to the armed conflict will be determined by reference to the considerations set forth in the following sections of this chapter and in Chap. 10. To the extent that the peacekeeping force remains uninvolved in the armed conflict, it will be bound to comply with applicable domestic law and human rights law norms, save to the extent that a relevant UN Security Council Resolution explicitly requires otherwise.[28] Reference should, however, be made to the Principles and Guidelines and associated Commentary

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[25] *McCann v. UK,* n. 20, para 148.

[26] *Andronicou and Constantinou v. Cyprus*, European Court of Human Rights, Application No. 25052/94, Judgment of 9 October 1997 para 183 indicates that what is required is a reasonable approach to planning and control. As to the circumstances when a use of lethal force to disperse demonstrators was not found to be absolutely necessary, see *Gülec v. Turkey*, European Court of Human Rights, Application No. 21593/93 Judgment of 27 July 1998. Note *Gül v. Turkey*, European Court of Human Rights, Application No. 22676/93, Judgment of 14 December 2000; *Streletz, Kessler and Krenz v. Germany*, European Court of Human Rights, Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001; *Makaratzis v. Greece*, European Court of Human Rights, Application No. 50385/99, Judgment of 20 December 2004, *Nachova and others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, and 43579/98 Judgment of 6 July 2005. These cases are discussed in Melzer 2008, pp. 105–115.

[27] Note that the UN Basic Principles restrict the use of firearms by officers exercising police powers to circumstances of "self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives". Intentional lethal use of a firearm must be strictly unavoidable to protect life, the law enforcement officials must give a clear warning with time for the warning to be observed unless doing so would put them at risk or would risk death or serious harm to others or would be inappropriate or pointless in the circumstances; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August–7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990), Articles 9 and 10.

[28] Marco Sassoli observes that any Security Council derogation would have to be explicit; Sassoli 2011, pp. 66–67.

derived from the Copenhagen Process, referred to in Chap. 8, particularly with regard to detention associated with peace operations.[29]

9.2.2 Human Rights Law in Armed Conflict: The Views of Commentators

No lesser an authority than Frits Kalshoven considers that the argument, espoused by some in the United States and elsewhere, that the applicability of the law of armed conflict excludes the application of human rights norms, is untenable.[30] That the two bodies of law apply contemporaneously must therefore be the starting point for the following discussion.[31] As Sarah McCosker has shown, a kaleidoscope of metaphors have been employed by commentators to seek to explain the relationship between the two bodies of law, and the tension between them illustrates 'that much remains unsettled, and that the relationship continues to evolve'.[32] For reasons that will emerge from the following discussion, the two bodies of law view matters associated with armed conflict from opposing ends of the metaphorical telescope. This does not, however, have to be an impediment to finding a way in which the respective sets of legal rules can coexist.[33] Before we start to propose a basis for such coexistence, however, we should discuss the nature of the difference of approach and what commentators have had to say about it.

There are specific occasions during armed conflict when international humanitarian law and human rights law are described as applying simultaneously.[34]

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[29] Consider, however, the European Court case of *Finogenov and others v. Russia* (the *Moscow Theatre Siege* case) in which, applying an arguably unusual degree of latitude, the Court concluded that the use of gas during the storming was not in the circumstances a disproportionate measure and did not breach Article 2 of the Convention; *Finogenov and others v. Russia* (*Merits and Just Satisfaction*), Judgment of 20 December 2011, para 236.

[30] Kalshoven 2006, p. 210. Cordula Droege agrees there is no going back to a complete separation of the two realms; Droege 2008, p. 548.

[31] Cordula Droege reaches a similar conclusion; Droege 2007, p. 320.

[32] McCosker 2013, pp. 149–151, where a new metaphor, 'interoperability', is proposed. Interoperability is the outcome that practitioners and operators would like to see emerge as the relationship develops. Whether it will remains to be seen. Irrespective of how one describes the relationship between the law of armed conflict and human rights law, "the key question is to work out how they interact in practice"; McCosker 2013, p. 152. For an account of the developing convergence of the two bodies of law observed over numerous decades, see Droege 2007, pp. 312–317.

[33] One seemingly useful metaphor is the notion of overlapping circles put forward by Daniel Thürer in Thürer 2011, pp. 125–130.

[34] Consider Droege 2007, p. 337 and Kleffner 2010, p. 72. Note also Knut Dörmann's observation that the precise interplay of the two branches of international law in situations of armed conflict is not settled; Dörmann 2012, p. 348 but note Daniel Thürer's view that some provisions of international humanitarian law are less precise than the corresponding provisions of international human rights law and might be developed by referring to them; Thürer 2011, p. 140.

While some situations are addressed extensively by the law of armed conflict, such as targeting in international armed conflicts, other human rights rules are not reflected in law of armed conflict provision. It is not clear that the absence of law of armed conflict provision on a particular matter necessarily means that human rights law norms apply.[35] It is also not made explicitly clear whether, in applying relevant law of armed conflict rules, particularly in cases of non-international armed conflict, human rights bodies must take account of customary law rules.[36]

The contention that human rights law applies at all times, including specifically in times of armed conflict but subject to the right of derogation[37] is certainly the prevailing view.[38] As Nils Melzer points out, although both bodies of law find their *raison d'être* in the protection of human dignity, their scope of applicability differs, the law of armed conflict being based on the existence of a state of affairs and the applicability of human rights law treaties generally depending on jurisdiction.[39] However, much of the controversy on this matter has concerned itself not so much with whether human rights law applies in armed conflict as with how it applies by reference to the law of armed conflict. As Francoise Hampson observes, the relationship between the two bodies of law is being worked out, inter alia, by human rights monitoring mechanisms, in part through legal judgments, and while litigation may be an acceptable way of working out specific answers to specific questions, it is, at the international level, a remarkably arbitrary and haphazard way of working out a general issue such as the relationship between two bodies of rules.[40]

As we shall see, in certain significant respects, the provisions of the two bodies of law conflict. Indeed, as Jann Kleffner has pointed out, the two bodies of law start from diametrically opposite standpoints in that the law of armed conflict allows combatants, military objectives and directly participating civilians to be engaged by all non-prohibited methods and means whereas human rights law by and large prohibits states from restricting human rights unless permitted to do so.[41] Where two bodies of law make differing provision in relation to the same circumstances, the resulting problem may be resolved by applying the principle *lex*

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[35] Francoise Hampson refers to the human right to demonstrate and to freedom of expression as examples; Hampson 2008, p. 560.

[36] See Hampson 2008, p. 561. The logic is that they should, simply because customary rules are just as much a part of international law as treaty provision.

[37] Kleffner 2010, p. 68; Melzer 2010, p. 279, note 7. Francoise Hampson explains that a human rights body, confronted with a non-international armed conflict where there has been no derogation, will apply human rights law in its entirety and notes the importance of derogation from European Convention provisions in appropriate circumstances; Hampson 2008, pp. 564–565.

[38] Francoise Hampson notes that the US and Israel reject this interpretation but sets out good grounds for proceeding on the assumption that human rights law and the law of armed conflict apply simultaneously; Hampson 2008, pp. 550–551.

[39] Melzer 2010, p. 279.

[40] Hampson 2008, p. 559.

[41] Kleffner 2012, p. 39.

specialis derogat legi generali. The more specific rule is deemed to take the particular circumstance more particularly into consideration and is accordingly to be preferred. In determining which of the relevant rules or bodies of rules constitutes *lex specialis*, one generally looks for the rule that addresses the relevant circumstances most precisely, narrowly or explicitly.[42] Where there is conflict between the *lex specialis* and the *lex generalis* on a matter, the approach to interpreting the *lex specialis* should, however, seek to produce an outcome that harmonizes the two norms as far as possible.[43]

Sarah McCosker has suggested that the *lex specialis* principle is often oversimplified, and identifies several difficulties in its application: that 'there can be difficulties in identifying the distinction between 'general' and 'special' law and also in determining when two rules should be regarded as relating to the same subject matter'; that there are differences between addressing the issue in terms of the relationship between specific rules and between two whole systems of law; that the lack of easily identifiable law of armed conflict norms in non-international armed conflict renders the *lex specialis* principle more difficult and, fourth, that the reasoning underpinning the application of the principle is frequently unarticulated.[44]

Certainly, simply to apply the law of armed conflict without reference to human rights law provision in circumstances where on any sensible reckoning human rights law ought to have something to contribute would not seem to be a sensible application of the *lex specialis* principle and would seem to sit uncomfortably with the philosophy underpinning Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Noting principles that require effective content to be given to all elements of a treaty and that when several norms bear on a single issue they should, as far as possible, be so interpreted as to give rise to a single set of compatible obligations, Sarah McCosker wonders whether such considerations may inform a way forward, if, that is, the approach can provide guidance that is capable of practical implementation.[45] Equally, so to water down the application of the principle that it ceases to exist would not seem adequately to acknowledge that states have developed a particular rule for particular circumstances. Sarah McCosker feels that the *lex specialis* principle has limitations in its ability to clarify the interplay between human rights law and international humanitarian

[42] See the discussion in Sassoli and Olson 2008, pp. 603–605.

[43] Sassoli and Olson 2008, p. 605 citing Koskenniemi 2006; Report of the International Law Commission (ILC), Fifty-sixth session, UN Doc. A/59/10, paras 304 ff. As to the situation in relation to two rules based on customary law, see Sassoli and Olson 2008, p. 605, although the present author agrees that, given that customary rules should be based on a generality of state practice coupled with *opinio juris*, such a conflict would seem less likely to exist. Conflict might of course arise between a customary rule and a rule based on treaty law. In such a circumstance the present author would suggest that the rule based on general state practice should be preferred, but that interpretations should seek to achieve an accommodation between the two.

[44] McCosker 2013, pp. 158–159.

[45] McCosker 2013, pp. 166–167.

law,[46] that solutions to the gaps and unsettled issues involving the two bodies of law cannot easily be settled by applying existing legal principles, that more rule making may be called for and that international lawyers from different fields must liaise with a view to connecting theory to practice and making the law more easily usable.[47]

Other commentators suggest that human rights law 'complement[s] the provisions of international humanitarian law to the extent there is either territorial or personal jurisdiction over persons affected'. In situations of international or non-international armed conflict 'international humanitarian law will have the status of *lex specialis*[48] in the event of any conflict of obligation'.[49] This notion of complementarity may lie at the root of suggestions that human rights law fills the gaps in international humanitarian law, a view which as we shall see later is somewhat controversial.[50] However, Jann Kleffner explains that 'in times of armed conflicts, a rule of international humanitarian law will often prevail over an incompatible norm of human rights law' because 'international humanitarian law is specifically devised to regulate situations of armed conflicts'.[51]

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[46] McCosker 2013, p. 161.

[47] McCosker 2013, pp. 176–177. See the conclusions section in Chap. 10.

[48] Pejic 2012, p. 83, footnote 21. Jann Kleffner points out that, under the doctrine, the specific rule may be interpreted within the confines or against the background of the general rule, as an elaboration, updating or specification of the latter, or the specific rule is applied instead of, and as an exception to, the general rule; Kleffner 2010, p. 73. Marko Milanović, however, argues that *lex specialis* should be discarded and should especially not be used to describe the relationship between international humanitarian law and international human rights law as a whole; Milanović 2011, p. 124.

[49] Gill and Fleck 2010, pp. 9–10 and Kleffner 2010, p. 51.

[50] Jann Kleffner argues that as, for example, "only human rights law regulates rights such as freedom of expression and freedom of assembly, international humanitarian law is irrelevant to the issue"; Kleffner 2010, p. 73.

[51] Kleffner 2010, p. 74. For the ICRC view on the general interplay between the two bodies of law, see ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, at pp. 13–15, where the application of the *lex specialis* approach is regarded as indispensible. The ICRC notes the generally complementary nature of the bodies of law, but refers to the different realities which each is designed to address. Important differences between the bodies of law that are noted include: that human rights law only binds states; that the essentially vertical relationship between a state and its citizen in human rights law contrasts with international humanitarian law in non-international armed conflicts which binds states and non-state armed groups that are party to the conflict and establishes an equality of rights between states and armed groups for the benefit of all those affected by the armed conflict, an essentially horizontal relationship; there are differences in the territorial reach of the two bodies of law; and only human rights law provides for derogation; ibid. and, as to the non-derogable status of rights under the law of armed conflict, see Kolb and Hyde 2008, pp. 237–239. Note, however, Yoram Dinstein's observation that derogation is permissible from certain law of armed conflict rules in certain extreme circumstances, specifically Article 5 of Geneva Convention IV and Article 54(5) of API; Dinstein 2010, p. 21, footnote 107.

William Schabas detects two distinct approaches, that of the ICJ which emphasizes the *lex specialis* character of the law of armed conflict, and the Human Rights Committee interpretation, which he characterizes as a 'belt and suspenders' approach in that the two bodies of law are regarded as essentially additive, preference being given to whichever affords the greater protection.[52]

As we saw in Chap. 8, extraterritorial jurisdiction under Article 1 of the European Convention is unusual but not necessarily rare. Jurisdiction will be found if state agents use force to bring an individual under the authority and control of state authorities, the critical factor being the exercise of physical power and control over the person in question.[53] In the case *of Smith, Elliss, Allbutt and others v. the Ministry of Defence*, the UK Supreme Court has decided that 'the jurisdiction of the United Kingdom under Article 1 of the [European] Convention extends to securing the protection of Article 2 to members of the armed forces when they are serving outside its territory'.[54] The Supreme Court reached this conclusion by applying the logic of the *Al Skeini* European Court judgment. Assuming the European Court would take the same approach as that adopted by the Supreme Court, it seems to follow that for states party to the European Convention, members of their armed forces and, one assumes, certain other organs of the state are regarded as being subject to their jurisdiction for the purposes of the Convention while on deployed operations overseas. Persons detained by them would also, to the extent described in the Court's decisions, be subject to that jurisdiction.[55]

While the complementary application of both bodies of law provides a fertile basis for academic debate, Geoff Corn is right to point out that 'there can be little tolerance for adding complexity and confusion to the rules that war-fighters must

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[52] Schabas 2007, p. 593. Ken Watkin takes the view that despite their differences, the two bodies of law manifest a commonality that causes them to converge; Watkin 2004, p. 10. Naz Modirzadeh, on the other hand, suggests that the differing origins, founding philosophies and communities of the two bodies of law reflect the brutal reality of war and that the relationship that is necessary for the spirit and letter of human rights law to apply during extraterritorial military operations and occupation between the invader and the invaded does not and should not exist; Modirzadeh 2010, p. 367. Noam Lubell takes the view that "human rights law obligations can extend extra-territorially and be relevant to international armed conflict, but it is still unclear exactly how far that extension can be stretched; Lubell 2005, p. 741

[53] *Al Skeini v. United Kingdom* (2011) 53 EHRR 18, paras 138–149, particularly 146 and 149; see also *Al-Jedda v. United Kingdom* (2011) 53 EHRR 18, para 85.

[54] *Smith and others v. Ministry of Defence*; *Ellis v. Ministry of Defence*; *Allbutt and others v. Ministry of Defence*, Supreme Court [2013] UKSC 41, 19 June 2013, para 55.

[55] Francoise Hampson comments that while human rights bodies, including the European Court, appear to think that human rights law applies during periods of occupation in the same way as in the state's own territory, the problem is that the international humanitarian law approach to the notion of occupation will not necessarily be applied by human rights bodies; "[i]f IHL is the *lex specialis* but human rights law remains applicable, a human rights body should presumably apply IHL to determine whether the situation is one of occupation"; Hampson 2008, p. 568. See the analysis of the Israeli control of the Occupied Palestinian Territory in Ben-Naftali 2011a, pp. 129–200.

apply in the execution of their missions. Instead, clarity is essential to aid them in navigating this complexity'.[56] Most regrettably, that clarity does not at present seem to be available. Naz Modirzadeh addresses the core issue as follows:

> The logic behind the [international humanitarian] law is also apparent: this is not a long-term relationship, and the law does not provide the grounds for a good society or interactions based on trust and due process. Rather, this is a set of rules that restricts the military forces while they fight, while recognizing that they *will* fight, and that people (even those not involved in the fighting) will die in the process. The addition of human rights law to this clear and honest (albeit stark) framing of roles and relationships runs the risk of confusing all actors and (more important) raising expectations that can never be met.[57]

Robert Kolb and Richard Hyde take a less pessimistic view, namely that recent practice reveals an array of relationships between the two bodies of law, designed to reinforce the separate branches of the law by combined action with the other branch. They argue that mutual suspicion and disinterest since 1945 have given way to mutual co-operation and progressive inter-penetration between international humanitarian law and international human rights law.[58]

Yoram Dinstein must be right when he comments that the continued operation in wartime of non-derogable and non-derogated human rights side by side with law of armed conflict norms will benefit some individual victims of breaches because the law of armed conflict does not deal with every aspect of life during armed conflict and because human rights law may offer individuals effective channels for redress for breaches of the law for which no equivalent avenues are opened by the law of armed conflict.[59]

Christopher Greenwood has characterized the law of armed conflict/international human rights law relationship in terms of mutual complementarity and the *lex specialis* principle,[60] on the basis that the lex specialis principle relates to specific rules in specific circumstances, as opposed to the general relationship between the two branches of law.[61] 'The effect of the *lex specialis* principle is that

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[56] Corn 2010, p. 54. Consider also Francoise Hampson's discussion of the application of *lex specialis* on a basis that depends on the precise issue at stake; noting that international humanitarian law cannot be fine-tuned to a particular situation in the same way as human rights law, she concludes that such an approach "is, quite simply, impractical" and "inconsistent with the ICJ statements which identify only IHL as the *lex specialis*"; Hampson 2008, pp. 561–562.

[57] Modirzadeh 2010, p. 364.

[58] Kolb and Hyde 2008, p. 274.

[59] Dinstein 2010, p. 25; see also Gioia 2011, p. 246.

[60] Greenwood 2009, p. 74 adopted by Kleffner 2013, p. 253. Christopher Greenwood went on to remark that "[t]he ICJ has repeatedly stated that international human rights law refers to international humanitarian law as a *lex specialis* which informs the content of human rights norms in areas to which both are applicable. Similarly, there may be instances where international humanitarian law looks to human rights law for guidance"; Kleffner 2013, p. 75. See also Yoram Dinstein's discussion of the *lex specialis* status of the law of armed conflict in Dinstein 2010, pp. 23–26.

[61] Greenwood 2009, p. 75 and Kleffner 2013; "The *lex specialis* principle, however, should not be misunderstood as applying to the general relationship between the two branches of

specific rules of human rights law are applied by reference to the standards in humanitarian law'.[62] This 'specific rules in specific circumstances' approach will be the focus for the discussion in much of the rest of this chapter. Moreover, it is an approach which is coherent with the point made by Marko Milanović that the relationship between international humanitarian law and international human rights law is a relationship between norms, or individual rules, not a relationship between regimes.[63]

9.2.3 Human Rights Law and the Law of Armed Conflict: The ICJ Judgments

The International Court of Justice in the *Nuclear Weapons* Case considered these matters and stated as follows:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. 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, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[64]

In a later case concerning the Palestinian Wall, the ICJ addressed itself to this issue again. It reaffirmed that, subject to any permissible derogation that a state

(Footnote 61 continued)
international law as such, but rather relating to specific rules in specific circumstances." See also Pejic 2012, p. 83: "It is submitted that international humanitarian law constitutes the *lex specialis* in situations of international armed conflict as it was both developed for such conflicts and elaborates the rights and duties of States and persons affected with more specificity than any other body of international law." Later in the same Chapter, the same author notes the need to state what the interplay between human rights law and the law of armed conflict means in practice, that situations of armed conflict cannot be equated with peace and sometimes the two sets of rules produce conflicting results because they reflect the differing realities for which each body of law was primarily developed. The conclusion is therefore drawn that the relationship between the two bodies of law must be determined on a 'case by case' basis; Pejic 2012, p. 84.

[62] Greenwood 2009, p. 75; see however Kleffner 2013, pp. 73–75.

[63] Milanović 2011, pp. 96–101.

[64] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 110 Int'l Law Rep 163 (1996), para 25; see also Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports (2004) 136 (*Wall* Case), para 106.

may make, human rights protections do not cease during armed conflict. It addressed the relationship between human rights law and the law of armed conflict, noting three possible circumstances. Some situations may be exclusively matters for international humanitarian law, others may be exclusively matters for human rights law and yet others may have to be considered by reference to both bodies of law. An example of the final of the three categories was the case before the court, which it considered by reference to both human rights law and law of armed conflict rules, in particular those in Geneva Convention IV and the Hague Regulations of 1907.[65]

In the later case of the Democratic Republic of the Congo v Uganda, however, the ICJ appeared to characterize the two bodies of law as complementary in nature,[66] or, as William Schabas puts it, as 'parts of a whole'.[67] Orna Ben-Naftali points to the paradigmatic shift that has taken place from an interpretation that international humanitarian law and international human rights law are mutually exclusive to a recognition that 'the confluence of the regimes currently enjoys the status of the new orthodoxy'.[68] Noting that the armed conflict paradigm is attractive to governments as affording a new tool kit to handle terror threats, Yuval Shany comments that the conceptual move from individual-based to collective-based counter-terrorism measures represents a radical shift of the balance between human rights and security interests and that the shift is further reflected in some specific measures adopted pursuant to the armed conflict paradigm, for example targeted killings and indefinite detention of terrorist suspects.[69] He also notes the objections to this shift, for example that it is a move from a framework that tolerates a limited set of counter-terrorism measures directed against a small group of individuals whose guilt can be legally established to a framework that permits the deadly targeting of members of armed groups, even individual members who pose a limited threat to the society in question, a shift that, he states, raises concerns of over-reaction and unjustified right-deprivation. One possible outcome is the emergence of a mixed legal framework to govern conflicts such as the war on terror, drawing rules and concepts from international humanitarian law and from international human rights law.[70]

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[65] Wall Case, para 106. See also Hampson and Salama 2001 where Francoise Hampson explains, that "the Advisory Opinion of the International Court of Justice would require the [Human Rights Committee] to take LOAC/IHL into account when determining that a killing was arbitrary in circumstances in which LOAC/IHL was applicable. The principle would apply even in non-international armed conflicts"; para 62.

[66] Case Conerning Armed Activities in the Territory of the Congo (*DRC v. Uganda*) 2005 ICJ 116, 19 December 2005, paras 178–180 and 216–217. For a discussion of the relationship between the two bodies of law by reference to Chapter IX of the ICRC Interpretive Guidance, see Kleffner 2012, pp. 45–52.

[67] Schabas 2007, p. 597.

[68] Ben-Naftali 2011b, pp. 4–5.

[69] Shany 2011, p. 23.

[70] Shany 2011, pp. 24–27.

So, the citation from the *Nuclear Weapons* case suggests that the rights to life, to family life, to enjoy possessions and so on will apply throughout periods of armed conflict but whether the authorities of the state have, in certain particular circumstances of armed conflict, breached the human rights law prohibition on arbitrary deprivation of life will be determined by applying the provisions of the law of armed conflict[71] and William Schabas argues that the two bodies of law will frequently be fundamentally compatible with each filling the gaps of the other, such that it is unlikely that conflicts will appear.[72]

These notions of complementarity, however, would seem to presuppose that the relevant human rights bodies, such as the Human Rights Committee and regional Human Rights courts, actually apply international humanitarian law rules and principles in terms in the course of their judgments in the circumstances indicated in the ICJ judgments. It would imply that counsel for the parties to proceedings in which international humanitarian law issues arise should be sufficiently informed as to that body of law so as to be able to argue such cases by reference to its principles and rules. In short, airy talk of applying one body of law by reference to another makes no practical sense if the relevant human rights bodies and the participants in their proceedings are either unable or unwilling in appropriate circumstances to do so. In this regard, Noam Lubell identifies what can most charitably be described as somewhat patchy performance in the human rights courts and commissions.[73] This may in part be attributable to the fundamentally different, but sometimes deceptively similar, language used by the two legal regimes.[74]

There may, however, be an alternative explanation for this apparent disjoin between what the ICJ is saying and the decisions of certain regional human rights courts. The ICJ judgments were all, essentially, reached in the context of international armed conflict. The relationship of most direct relevance to the issues the Court was considering was therefore that between a well-developed body of treaty law relating to such conflicts and the body of international human rights law. The European Court's decisions that have concerned situations that, objectively if not necessarily politically, would meet the Common Article 3 threshold of a non-international armed conflict do not tend to refer to the law of armed conflict.[75]

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[71] Francoise Hampson points out that a most important implication of the co-applicability of the law of armed conflict and human rights law is "that bodies charged with monitoring compliance with HRsL would appear to have the competence to assess whether a killing was a breach of HRsL, even if they have to interpret HRsL in the light of LOAC"; Hampson 2011, p. 188. The reference to 'bodies charged' is clearly a reference to the three regional human rights courts.

[72] Schabas 2007, p. 598.

[73] Lubell 2005, pp. 742–744. See also Garraway 2012, pp. 100 and 109.

[74] Lubell 2005, pp. 744–746. Recall, however, that human rights law bases authority to use force and permissible deprivation of liberty on the threat posed, among other things, unlike the law of armed conflict which focuses on the status of the individual concerned; Garraway 2012, pp. 107–108.

[75] Sassoli 2011, p. 70.

Clearly, the law of non-international armed conflict comprises considerably less well-developed treaty law rules and customary rules the terms of some of which are debated.[76]

9.2.4 The European Court of Human Rights' Approach

We should now consider the approach that a regional human rights court has adopted to this issue, and for that purpose will consider some selected jurisprudence of the European Court of Human Rights (European Court).[77]

Let us start with the case of *al Skeini* in which the European Court recalled '[t]he Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict'.[78] However, the Court then went on to hold that

> where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed,[79] concrete constraints may

[76] Consider, however, the case of *Cyprus v. Turkey*, 35 EHRR 731 GC the context of which has many of the hallmarks of a belligerent occupation to which the law of international armed conflict would, on the face of it, seem to apply. The case concerned complaints relating to persons missing since the hostilities that gave rise to the partition of the island, the violation of the rights of displaced persons to respect for their home and property, violations resulting from the living conditions of Greek Cypriots in Northern Cyprus and certain matters relating to Turkish Cypriots in Northern Cyprus. Consider also the McCann case before the European Court, discussed infra, which arose from the Northern Ireland troubles, to which reference is made in Chap. 2 and which the UK government did not characterize as an armed conflict. The cases involving Turkish/Kurd events arose from a conflict which the Turkish government also has chosen not to regard as an armed conflict. Cases have also arisen from the conflict involving Russian armed forces in Chechnya which is also non-international in nature.

[77] Peter Rowe has remarked that obligations under the European Convention are nothing new and would be taken by UK soldiers in their stride; Rowe 2006, www.unawestminster.org.uk, p. 18. He expressed this view, however, before the Al Skeini and Al Jedda judgments. See also Heintschel von Heinegg 2011, pp. 12–15. As Peter Rowe points out, no derogation action was taken by the UK with regard to the Falklands War, the Gulf War 1990–1991, the Kosovo Conflict in 1999 or the Iraq War in 2003; Rowe 2006. He speculates that the decision not to derogate may be attributable to a possible understanding that enemy combatants would not be regarded as subject to UK jurisdiction.

[78] The judgment cites the following cases at this point, namely *Güleç v. Turkey*, 27 July 1998, §§ 81, *Reports of Judgments and Decisions* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85–90 and 309–320 and 326–330, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; *Kanlibaş v. Turkey*, no. 32444/96, §§ 39–51, 8 December 2005. The reference in al Skeini to 'the context of armed conflict' is not, of course, necessarily synonymous with application to acts of combat or, indeed, to the actual conduct of hostilities during an armed conflict so no issue is taken with this part of the judgment.

[79] As to which see para 93 of the judgment.

> compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.[80]

There are ambiguities as to what exactly this cited passage is saying about the more general relationship between the two bodies of law. One interpretation is consistent with the line taken by the ICJ in the Nuclear Weapons and Wall cases. According to this interpretation, the duty to investigate under Article 2 arises during armed conflict only if there is an alleged breach of the right to life. Applying the 'specific rules in specific circumstances' principle referred to by Christopher Greenwood and noted above, there is only a breach of the right to life if the law of armed conflict is violated resulting in death. So if in a situation of combat, death occurs and is alleged to result from a breach of the law of armed conflict by a state organ, such as a member of the armed forces, there must be a suitable investigation.

This would take matters rather further than the law of armed conflict would contemplate as a mere allegation seems to suffice, irrespective whether there is any objective basis for suspicion. There is a clear law of armed conflict obligation to investigate grave breaches of the Conventions and of Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API), other breaches of the law of armed conflict,[81] other war crimes, genocide and crimes against humanity.[82] Amichai Cohen and Yuval Shany suggest that the investigation duty extends beyond criminal allegations, basing that contention on the duty to take precautions but noting that in suitable circumstances non-criminal investigations may be sufficient.[83] Accepting that this may occasionally be the case,[84] it would seem that under the law of armed conflict, the obligation to

[80] *Al Skeini and others v. UK*, Application No. 55721/07, Grand Chamber Judgment of 7 July 2011, para 164. This part of the judgment also refers to the following cases: *Kaya v. Turkey*, 19 February 1998, §§ 86–92, *Reports of Judgments and Decisions* 1998-I; *Ergi,* n. 56, §§ 82–85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101–110, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156–166, 24 February 2005; *Isayeva*, n. 56, §§ 215–224; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158–165, 26 July 2007.

[81] See for example Geneva Convention I, Article 49, Geneva Convention II Article 50, Geneva Convention III Article 129, Geneva Convention IV Article 146 and API Article 86(1) and consider the obligation to ensure respect in Common Article 1 to the Geneva Conventions.

[82] Cohen and Shany 2011, p. 42.

[83] Cohen and Shany 2011, pp. 37 and 45.

[84] For example, if a weapon starts to perform significantly less reliably than hitherto, a state might be failing to take constant care to protect civilians and civilian objects and might be failing to take all feasible precautions to ensure that attacks comply with the proportionality rule if it does not take some appropriate steps to investigate the poor performance with a view to determining whether rectifying action is feasible.

investigate will usually only arise if there are grounds to suspect the commission of an offence. The *al Skeini* judgment, however, seems to suggest that investigations would be required very much more frequently and one rather doubts the practical ability of most armed forces to meet the associated resource requirement. If states are indeed mostly unable to comply, this rather leads to the conclusion that this part of the *al Skeini* judgment does not reflect the law.

An alternative interpretation of the relevant passage is that the right to life as written and interpreted in human rights law applies in the situations of generalized violence and armed conflict referred to in the first part of the passage, with the inference that the duty to investigate mentioned in the second part of the passage arises even in situations of generalized violence, such as combat during armed conflict. While the references to delay and to 'reasonable steps' may appear to be superficially helpful, the impression with which one is left is that so far as the court in al Skeini is concerned, the circumstances in which the human rights law rules will be interpreted by reference to the law of armed conflict will be very few indeed,[85] a position that is hard to reconcile with the judgments of the ICJ discussed earlier.

States are likely to apply the ICJ approach in practice. This would involve securing the right to life by ensuring that during armed conflict hostilities law of armed conflict rules are complied with. An interesting question is whether decisions of a regional human rights court can override the position of the ICJ, even for states party to the enabling treaty, if, that is, one interprets the relevant judgments as conflicting with one another. The pragmatic solution is for states to decide the circumstances in which they consider that human rights rules should be interpreted by reference to the provisions of the law of armed conflict. Strict adherence by armed forces personnel with the law of armed conflict in all such circumstances will then provide the relevant state with a sound basis for argument before the relevant court, particularly if the state has made declarations as to its interpretation of the legal position. Such an approach will also be consistent with the 'specific rules in specific circumstances' appreciation discussed earlier in this chapter.[86]

For the time being, for states that are party to ECHR, para 164 of the *al Skeini* judgment may be a problem. Full application of the human rights law rules as to

[85] Imposing a duty to investigate, whatever the caveats as to practicability, in circumstances in which the law of armed conflict would impose no such duty is to be taken as asserting that a breach of the right to life is to be interpreted by reference to human rights law, not the law of armed conflict. That very practicability is, however, one of the factors that ought to require that breach of the right be determined by applying law of armed conflict rules.

[86] As Francoise Hampson points out, a human rights court confronted with circumstances that arise from a situation of conflict will have to determine whether an armed conflict was in existence and, if so, whether it was international or non-international in nature in order to "determine which set of IHL rules apply to the situation"; Hampson 2008, pp. 552–558.

the right to life, including the investigation obligations, during a high intensity, violent and potentially protracted armed conflict makes little sense and, one might speculate, is unlikely to have been the Court's intention.[87]

9.2.5 Jurisdiction Under ECHR

For the European Convention on Human Rights to apply to a given situation, it is necessary to determine whether the affected individual was at the relevant time within the jurisdiction of a state party to the Convention under Article 1 of the Convention. Article 1 obliges states party to secure to everyone within their jurisdiction the Convention's rights. Jurisdiction in Article 1 is principally a territorial notion.

However, the European Court of Human Rights case of *Bankovic and Others v. Belgium and 16 other Contracting States*[88] merits consideration in this regard. The case involved an application by relatives of persons killed as a result of the aerial bombardment by NATO of a radio and television station in Belgrade during the Kosovo conflict. The application was made against those NATO states that participated in the conflict and that are party to the European Convention. The applicants suggested that the bombing brought those who died within the jurisdiction of the Convention. They argued that the 'effective control' test to establish extra-territorial jurisdiction should be adapted, effectively, so as to make the extent of the Article 1 right to life obligations proportionate to the level of control exercised. The Court held that the crucial issue was whether the extra-territorial act of bombing was capable of bringing the deceased within the jurisdiction; it pointed out that jurisdiction under Article 1 of the Convention reflects an essentially territorial notion and that other bases of jurisdiction (such as effective control) are exceptions that would require special justification.[89] Applying the effective control

[87] Consider Geiss and Siegrist 2011, pp. 24–25 where the possibility of finding middle ground between the two paradigms is discussed. Certainly the references to less effective measures, delay and reasonableness in the cited passage suggest that the court was trying to reflect practical reality. For the reasons noted in this Section, however, it is suggested that the Court pursued the wrong approach. See also Cohen and Shany 2011, p. 50 on this issue and at pp. 60–72 as to the requirements associated with the human rights law duty to investigate.

[88] 2001-XII; 44 EHRR SE 5GC.

[89] *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, Application No. 52207/99, Admissibility Decision of 12 December 2001, *available at* 41 I.L.M. 517, para 54. At para 71 the Court referred to its recognition of the exercise by a Contracting State of extra-territorial jurisdiction as exceptional. The Court had done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. Cordula

test to the particular circumstances, the court held that jurisdiction was not established.

So following the case of *Bankovic*, bombardment of targets from the air would not, alone, appear to be sufficient to bring the affected persons on the ground within the jurisdiction of the states whose armed forces undertake the aerial bombardment.

However, in *Loizidou v. Turkey (Preliminary Objections)* the European Court of Human Rights determined that this notion of jurisdiction is not limited to national territory of the states party.[90] State party responsibility can also arise if the activities of the authorities of the state, whether inside or outside its national territory, generate effects outside its territory,[91] and if, through military action, it exercises effective control of an area outside its national territory.[92] Nevertheless, while particular circumstances may give rise to extra-territorial jurisdiction under the European Convention,[93] its more usual application is within the territory of the contracting state.[94]

Considering the question of jurisdiction in relation to events that occurred during the period of belligerent occupation in Iraq, the European Court of Human Rights decided in 2011 that

> the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[95]

(Footnote 89 continued)
Droege concludes that "one situation where human rights law applies extraterritorially is the situation where the authorities have 'effective control' over a territory, so that they can effectively and practically ensure respect for human rights", but with differing degrees of control come varying obligations, going from the duty to respect to the duties to protect and fulfill human rights; Droege 2007, p. 330. As to the residual human rights law obligations retained by a state part of the territory of which has been occupied, see *Ilaşcu and Others v. Moldova and Russia*, Application number 48787/99, European Court of Human Rights Grand Chamber (2004), para 313. Andrea Gioia notes the corresponding law of armed conflict obligation in Common Article 1 to the Geneva Conventions, 1949 not only to respect the Conventions but to ensure respect for them; Gioia 2011, p. 208.

[90] *Loizidou v. Turkey*, Application No. 15318/89, Judgment on Preliminary Objections dated 23 March 1995, paras 62–64. The Court held that the obligation to secure in such an area the rights and freedoms set out in the Convention derives from the fact of that control, whether it is exercised directly, through armed forces or through a subordinate, local administration; *Loizidou v. Turkey*, para 62. The case concerned the circumstances arising from Turkish military action in Northern Cyprus.

[91] *Drozd and Janousek v. France and Spain* 14 EHRR 745.

[92] *Loizidou,* n. 90 above, para 56.

[93] As to extra-territorial application of the European Convention, see Gioia 2011, pp. 205–212.

[94] Numerous decisions after the *Bankovic* judgment have limited its effect; see the discussion in the Supreme Court judgment in the *Smith* case, n. 54 above.

[95] *Al Skeini and others v. UK*, Application No. 55721/07, Grand Chamber Judgment of 7 July 2011, para 149.

As to the particular occurrences cited in the proceedings, the Court observed that the deaths were

> caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased.

In relation to another of the cases before it, the Court decided

> that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.[96]

This all leads to the conclusion that human rights law applies during periods of occupation, although whether human rights courts will interpret the notion of 'occupation' in line with the law of armed conflict is unclear. It is also unclear how the human rights courts will address the conduct of military operations in circumstances where the military force has no territorial control.

If, as seems clear from the discussion so far, we must consider the specific factual circumstances and the specific rules when determining whether human rights law norms or law of armed conflict norms apply to a particular situation this has an important consequence. The more circumstance- and fact-dependent the decision is as to the rule that is to be applied, the more difficult it is likely to become to advise commanders and their personnel appropriately and in advance of military operations as to their rights and obligations. Indeed, there can be no guarantee that the judgment of the commander on the ground, consulting with his legal adviser, as to the applicability or otherwise of law of armed conflict rules will be approved by a Court reviewing the circumstances after the event, nor indeed that that decision will be taken in the knowledge of all the facts later apparent to a court reviewing that decision or act.

So we can in summary conclude that jurisdiction under the European Convention will potentially arise when the claimant is in the territory of a state party or outside it but under sufficient authority and control of agents of the state party. The exercise of such authority and control may be due to what agents of that state do to the complainant personally or to the degree of authority and control that they exercise over the territory where the affected person is.

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[96] *Al Skeini* judgment, para 150. Perhaps this part of the judgment should be seen in the light of *Issa and others v. Turkey*, Case number 31821/96, Judgment dated 16 November 2004, para 71 available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460, where it was held that states can also be held accountable for violation of Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating—whether lawfully or unlawfully—in the latter state.

9.3 Applying Human Rights Law to Specific Armed Conflict Activities

Naz Modirzadeh points out that while much of the literature talks in somewhat general terms about the relationship between these bodies of law, there is relatively little focus on what convergence between international humanitarian law and international human rights law means in terms of practical activities during armed conflict.[97] In the following sub-sections, we shall therefore consider the implications of applying human rights law norms to some particular activities associated with the conduct of armed conflict.

9.3.1 Combat

Applying the 'specific rules in specific circumstances' yardstick that we have been discussing, one would have some difficulty in imagining any circumstances of combat which would merit the application of human rights law norms.[98] In the context of situations that are capable of being characterised as non-international armed conflicts, however, the European Court has applied human rights law norms to events that would seem to amount to the conduct of hostilities.[99] Andrea Gioia

[97] Modirzadeh 2010, pp. 368–370.

[98] Melzer 2010, p. 280; "In case of contradiction between obligations arising under human rights law and international humanitarian law with regard to the same military operation, the *lex specialis* principle generally entails that the international humanitarian law takes precedence over human rights law". Nils Melzer then expresses the view that when international humanitarian law is not sufficiently clear or precise to determine the lawfulness of a specific killing during the conduct of hostilities, the rules must be clarified by applying treaty interpretation rules and general principles. Only when international humanitarian law is silent and the general principles of that body of law give no guidance should reference be made to human rights law general principles and rules; Melzer 2010, pp. 280–281. See also Corn et al. 2012, p. 53, expressing the view that there is no deprivation of the right to life when a combatant is targeted in connection with an armed conflict. Jann Kleffner proposes that human rights norms should be applied during an armed conflict when force is used in relatively calm situations of occupation to maintain public order and safety or in areas under the firm control of state authorities in times of non-international armed conflict; Kleffner 2010, p. 75. See also Watkin 2004, p. 22. But consider the fundamental difference in relationship that exists respectively between a citizen and his or her own government and the civilian in occupied territory *vis-à-vis* the Occupying Power and recall the fundamental differences of purpose between occupation law and human rights law; Modirzadeh 2010, pp. 364–367 discussing the House of Lords judgment in the *Al Skeini* case.

[99] Consider, for example, *Ergi v. Turkey*, 32 EHRR 388, paras 79–86; case of *Ahmet Özkan v. Turkey*, European Court Application No. 21689/93, judgment dated 6 April 2004, paras 296–330. Andrea Gioia criticizes this tendency of the European Court to ignore IHL when deciding cases where the interested state was clearly involved in an armed conflict, but notes that no state has so far relied on Article 15 of the Convention to justify derogations from the Convention on the basis that it was involved in an armed conflict; "there have been cases where Article 15 was invoked

points out that the European Court has so far never squarely contradicted international humanitarian law in its case-law but, rather, has in his view contributed to a better legal regulation of armed conflict, for instance by filling perceived lacunae.[100]

Yoram Dinstein expresses the view that

> [i]n allowing lethal attacks against enemy combatants, [the law of international armed conflict] runs counter to the basic tenets of human rights law concerning extra-judicial deprivation of life. Nevertheless, in the event of an international armed conflict, the [law of international armed conflict] norms – as *lex specialis* – prevail over the *lex generalis* of human rights.[101]

An obligation to undertake the rather meticulous planning that human rights law contemplates, discussed in Sect. 9.2.1, is unlikely to be consistent in most circumstances with the pressing and critical military requirements that are usually associated with the effective conduct of combat operations during armed conflict.[102] Limiting the use of lethal force to circumstances when it is absolutely necessary for the fulfillment of one of the circumstances in Article 2(2) of the ECHR is likely, in most circumstances of armed conflict combat, to make no sense whatever.[103]

Moreover, the European Court did not do so when deciding on a case arising out of the conflict in Chechnya. The court recognized that the situation called for exceptional measures including the employment of military aviation equipped with heavy combat weapons to enable the state to regain control over the relevant territory and to suppress the insurgency, and that if those aircraft are attacked by illegal armed groups that could have justified the use of force thus coming within Article 2(2) of the Convention.[104] However, caution is required. While the Court

(Footnote 99 continued)
in situations which the Court itself might have considered to amount to an armed conflict, but it is perhaps understandable that the Court may wish to avoid contradicting a different legal qualification made by the interested state"; Gioia 2011, p. 247. Daniel Thürer also considers it regrettable that the European Court plays what he describes as a cautious and indirect role in promoting international humanitarian law and points to the direct application by the Inter-American Commission on Human Rights of humanitarian law rules; Thürer 2011, p. 159.

[100] Gioia 2011, p. 248.

[101] Dinstein 2010, p. 24 and see Corn 2010, p. 66.

[102] See however n. 9 above as to the recognition by the European Court in the *McCann* case of the limitations that the circumstances may place on the practical ability to plan.

[103] Consider for example Lubell 2005, p. 749 where the point is made that reconstructing or discarding the law of armed conflict approach to the use of force in major non-international armed conflict battles similar in scale to those occurring in international armed conflicts would not be easily achieved; "Surely it could not be maintained that a soldier on the battlefield could only fight in individual self defence?" Lubell 2005, p. 749.

[104] *Isayeva, Yusupova and Basayea v. Russia*, app. Nos. 57947/00, 57948/00, & 57949/00 (24 February 2005),, para 178, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Isayeva%2C%20%7C%20Yusupova&sessionid=1751995&skin=hudoc-en. Note, however, that Russia had not derogated under Article 15 so

might find that some use of military force is justified, it may be expected to examine the circumstances, the action taken, the proportionality of that action, the degree to which planning was feasible and other relevant factors in order to determine whether the actual use of force breached Article 2.

Marco Sassoli and Laura Olson argue that the UN Basic Principles[105] would apply to military authorities only if they exercise police powers, 'which could be interpreted as meaning *e contrario* that the rules are not binding for military authorities engaged in the conduct of hostilities', with the result that in deciding which body of law applies it is important to identify when the armed forces can properly be described as 'exercising police powers'.[106]

In the conduct of a fluid, manoeuvrist campaign, information will not always be complete, decision-making must be rapid and flexibility of initiative and response will be critical. Requiring that enemy military casualties be limited by reference to a rule of strict proportionality simply does not accord with the way in which the hostilities must be, and are, conducted by the armed forces of states. Conducting investigations following each lethal use of force as discussed in Sect. 9.2.1 is also unlikely to be practical due, for example, to constraints over the timely availability of the necessary personnel and equipment and the probable absence of adequate security at the scene of the relevant event. An obligation to undertake such investigations will rapidly become even less realistic as the intensity of combat operations increases.

Marco Sassoli comes to the conclusion that the issue as to who has the right to participate directly in hostilities is exclusively governed by international humanitarian law.[107] Moreover, he argues that the IHL rules on attacks against combatants, incidental civilian losses, detention of prisoners of war or civilian internees inform the interpretation in times of armed conflict of the corresponding human rights (such as the right not to be deprived of life arbitrarily).[108]

When considering the points made in this section, we should bear in mind:

- the ICJ's view in the Nuclear Weapons Advisory Opinion that 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life ……. can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'[109];

(Footnote 104 continued)
the matter was assessed according to a background of normalcy, and the Court could not reconcile the use of air attack against populated areas outside wartime and without prior evacuation of civilians with the degree of caution expected from a law enforcement body in a democratic society; ibid., para 191.

[105] See n. 27 above.

[106] Sassoli and Olson 2008, p. 611.

[107] Sassoli 2011, p. 72.

[108] Sassoli 2011, pp. 73–74.

[109] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), (1996) ICJ Rep. 226, 110 ILR 163, para 25; Advisory Opinion on the Legal

- the ICJ's comments in the *Wall* Case; and
- Christopher Greenwood's 'specific rules in specific circumstances' explanation.

In doing so, one is led to the inescapable conclusion that armed conflict combat is a specific circumstance in which a complaint that there has been an arbitrary deprivation of the right to life can only sensibly be adjudicated by reference to the body of law that balances military necessity and humanity, i.e. the law of armed conflict.[110] States party to the European Convention must, however, take into account the comments of the European Court of Human Rights in the *al Skeini* case, discussed above.

In the majority of combat circumstances during international armed conflicts, human rights law could not apply anyway because the opposing forces or individuals will not be within the jurisdiction of the attacking state.[111] Where that is the case, the law of armed conflict will apply in its own right, not as a means of interpreting human rights law rules.

In non-international armed conflicts involving high intensity, sustained hostilities, it is clear that the law of armed conflict alone must apply to the conduct of the combat. Some may argue for a different conclusion in situations that are only just over the non-international armed conflict threshold. Either there is a non-international armed conflict or there is not, and if there is, the law of armed conflict should apply to targeting decisions made in connection with it.

However, as Marco Sassoli correctly explains, in many respects both human rights law and the law of armed conflict lead to similar results but with one or the other providing greater detail. Thus, both prohibit killing of civilians not involved in the conflict and of detainees, both prohibit torture, taking hostages, both require humane treatment of detainees and respect for judicial guarantees in a trial. Both bodies of law prohibit starving civilians and forcible displacements and both require that the wounded and sick be collected and cared for. Moreover, the rules as to the use of the Red Cross emblem, as to which weapons may be lawfully used and as to perfidy and ruses must be found in international humanitarian law.[112]

Combat is not, however, the only relevant circumstance that we must consider. There are other activities that armed forces must undertake as part of the efficient conduct of a military campaign and to which human rights law is potentially relevant, and the next such activity we shall consider is requisitioning.

(Footnote 109 continued)
Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Wall* Case), 9 July 2004, (2004) ICJ Rep. 136, para 106. See also Watkin 2004.

[110] Watkin 2004, p. 22.

[111] ECtHR case of *Bankovic*, n. 89 above.

[112] Sassoli 2011, p. 78. Marco Sassoli argues that the only issues of great practical importance on which the two bodies of law seem to offer divergent solutions are when a fighter may be attacked and when and under what procedures a fighter may be detained; Sassoli 2011.

9.3.2 Requisitioning[113]

The procedural requirements of Article 6 would seem to be capable of applying to decisions as to the making of requisitions and as to compensation for requisitions as provided for in the Hague Regulations,[114] in Hague Convention V[115] in Geneva Conventions I[116] and IV[117] and in API.[118] Whether Article 6 will in fact apply will depend on whether the act of requisitioning is considered to amount to the determining of the citizen's civil rights over the relevant property.[119]

This suggests that a requisitioning decision under Article 52(1) of the Hague Regulations, 1907, might also amount to interference with the occupier's Article 8 rights. Whether it does will depend on what is requisitioned and may fall to be decided according to the criteria in Article 8(2) or under the law of armed conflict, depending again on whether the circumstances of the particular case make Article 8, the law of armed conflict, or a combination of the two the appropriate rule to apply.[120]

Derogation from Articles 6 and 8 is permitted by Article 15, so if a State is contemplating taking requisitioning action in connection with an armed conflict, it should also consider derogation before implementing such plans.

On the assumption that compensation is paid in respect of requisitions as provided for in Article 52(3) of the Hague Regulations, 1907, it is to be doubted that such requisitioning would be found to breach Article 1(1) of the First Protocol to the European Convention. Seizure of property can be distinguished from requisitioning in that seizure is the temporary taking of property for military use and

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[113] A requisition is defined as "an official order laying claim to the use of property or materials; the appropriation of goods for military or public use; a formal written demand that something should be performed or put into operation"; Concise Oxford English Dictionary, 11th Edn, 2006, p. 1222.

[114] Hague Regulations 1907, Article 52(1) and (3).

[115] Hague Convention V, 1907, Article 19(1).

[116] Geneva Convention I, Articles 34(2) and 35(2).

[117] Geneva Convention IV, Articles 51, 55 and 57. Note that decisions by the state as to expropriation or regulation of the use of private land have been held to come within the Article 6(1), ECHR right to a fair trial; *Sporrong and Lönnroth v. Sweden* A52 (1982); 5 EHRR 35 PC.

[118] API, Article 14(2) and (3).

[119] Consider *Vasilescu v. Romania* 1998-III; 28 EHRR 241.

[120] It should be noted that Article 1 of the First Protocol to the European Convention protects the right to peaceful enjoyment of possessions, limiting the circumstances for deprivation of possessions to "in the public interest and subject to the conditions provided for by the law and by the general principles of international law"; Article 1(1). The Article 1(2) provision permitting the state to control the use of property "in accordance with the general interest" may extend to requisitions, depending on the circumstances. Consider also Noam Lubell's discussion of economic, social and cultural rights in Lubell 2005, pp. 751–753, and note his conclusion that there are obvious difficulties when it comes to implementing economic, social and cultural rights in situations to which international humanitarian law applies, for example occupation, as to such matters as derogation and the level of fulfillment that needs to be achieved.

presupposes the return of the property to the owner at the end of hostilities and payment to the owner of compensation. A record is therefore maintained of seized property to facilitate compensation arrangements later.[121] It would therefore also seem unlikely that seizure of property, properly conducted and administered, would involve breach of Article 1(1).

9.3.3 Article 5 Tribunals

Article 5 of Geneva Convention III provides that where doubt exists as to the status of captured persons who have committed a belligerent act they retain protection under the Convention until 'their status has been determined by a competent tribunal'.[122] If it is determined that the captured person belongs to one of the categories in Article 4 of the Convention, he has prisoner of war status and, as such, has the rights concerning the circumstances of his detention, his treatment, his liability to work and other matters that are set forth in the Convention, in API and in the customary law of armed conflict. However, a determination under Article 5(2) is not decisive as to civil rights and obligations.

It is a process intended to apply at or near the zone of operations and merely determines the status of the individual. On this basis Jelena Pejic has concluded that judicial review is not required[123] and that must be correct.[124]

9.3.4 Other Decisions

The three kinds of decision that we have considered in the immediately preceding paragraphs do not, of course, by any means constitute an exhaustive or even

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[121] Article 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest. Consider, however, litigation in relation to taking of, or denial of access to, property, such as *Loizidou v. Turkey*, n. 90 above, para 100. Consider the difficulties as to the seizure of real property discussed in Corn et al. 2012, pp. 304–305, and note the example of seizure of a hotel vehicle during military operations in Panama, discussed at Corn et al. 2012, pp. 303–304.

[122] Geneva Convention III, Article 5(2). Note that on the rare occasions after the fall of Saddam Hussein when captured personnel invoked their right to prisoner of war treatment, "Coalition Forces conducted a tribunal in accordance with the provisions of Article 5 of GCIII"; Wall 2007, p. 416. For a discussion of the notion of 'competent tribunal' in the context of Article 5, and for the US practice on these matters, see Solis 2011, pp. 228–231 where it is suggested that holding Article 5 tribunals for captured Taliban and al Qaeda fighters would have been worth the minimal effort in order to silence critics of that aspect of US confinement of 'unlawful enemy combatants'.

[123] Pejic 2012, p. 87.

[124] As to the position in relation to detention operations during non-international armed conflict, see Sect. 8.4.

representative list of the armed conflict-related decisions that fall to be made. Rather, they are intended to provide a sensible basis for trying to clarify the issues. As noted earlier, whether human rights law will in fact apply to such a decision will in practice depend first on whether the relevant state has derogated under Article 15. Absent such derogation, the 'specific rules in specific circumstances' approach will again determine whether the particular decision should be reached according to the substantive and procedural rules of human rights law alone, according to the rules of the law of armed conflict alone or under a combination of the rules of both bodies of law. One must, however, note the undesirable uncertainty as to the applicable law that such an arrangement involves and the consequent difficulty in giving sensible instructions to armed forces personnel in advance of relevant military operations. Confronted with such legal uncertainty, the danger is that respect for legal constraint will be eroded. It is difficult to see how this is in the interest of victims, uninvolved civilians or, for that matter, of members of the armed forces.

9.4 Applying Particular Rights in the Armed Conflict Context

In the following subsections, we will consider the issue in the other direction, as it were, by assessing how the operation of particular human rights might foreseeably be affected by the circumstances applying in armed conflict.

9.4.1 Liberty and Security of Person[125]

The ECHR sets forth the right to liberty and security of person and provides for certain exceptions to this right in connection with such matters as criminal investigations, proceedings and punishment, detention of minors for education purposes, detention to effect immigration control and certain other limited classes of detention. No exemption from the right is provided for in respect of detention for reasons of security where there is no reason to suspect that an offence has been or will be committed[126]; it follows that if the relevant state takes no derogation action under Article 15, its only basis for resisting a claim under Article 5 by persons detained in such circumstances would be to argue that this human rights

[125] ECHR, Article 5.

[126] The Convention does exclude from the right lawful arrest or detention for non-compliance with a lawful court order or to secure fulfillment of an obligation prescribed by law. Detention or arrest properly effected on these grounds would not breach the right.

law rule does not apply in the particular circumstances of the case. A more detailed consideration of this issue lies outside the scope of this chapter.

It suffices for present purposes to say that it ought to be easier to argue that the law of armed conflict alone should regulate the detention of civilians undertaken:

- in the course of international armed conflict hostilities and/or
- in areas where such hostilities are continuing or have recently taken place, or
- before it has been possible to withdraw such detainees to a location away from the area where military operations linked to such hostilities are taking place.[127]

For the reasons discussed in Chap. 8, it does not follow that human rights law should regulate arrangements relating, for example, to the detention of prisoners of war wherever they are located.

9.4.2 Fair Trial

The European Convention includes the right to a fair trial,[128] a right that covers determination of civil rights and obligations or of any criminal charge and stipulates, inter alia, that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[129] The requirements in relation to criminal trials would appear to extend not only to criminal proceedings by a state against its own citizens, including against members of its own armed forces before military courts, but will also apply to any criminal proceedings against enemy personnel for example in connection with alleged war crimes.

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[127] Such an argument is supported in the context of international armed conflicts by the extensive treaty provision in relation to detention operations during such conflicts. The assumption was that domestic law would address the authority to detain, grounds for review and other matters associated with detention operations in the context of non-international armed conflicts. Complex issues arise in relation to detention during trans-national non-international armed conflicts. As to detention operations during such conflicts, see Chap. 8.

[128] ECHR, Article 6.

[129] ECHR, Article 5(1). The article goes on to require: public pronouncements of judgments subject, inter alia, to the exclusion of the press and public from all or part of the trial for reasons of national security; the presumption of innocence; the right of the accused to be promptly informed of the nature and cause of the accusation; the right of the accused to have adequate time and facilities to prepare his defence; the right of the accused to defend himself or to use his choice of legal assistance or if he has not sufficient means to pay, to be given legal assistance free when the interests of justice so require; the right of the accused to have witnesses against him examined and to call witnesses in his own behalf; and the right of the accused to have the free assistance of an interpreter if he cannot understand or speak the court language. Note that Article 75 of API makes similar provision.

The interesting issue is what exactly does the term 'civil rights and obligations' include. The European Court of Human Rights has interpreted the term to include private disputes between individuals in tort,[130] contract,[131] succession cases,[132] commercial law cases[133] and disputes concerning land.[134] In addition

> it regulates more kinds of disputes between the individual and the state than that [private law] meaning might suggest. Thus cases concerning the public control of land, the regulation of commercial or professional activities or practice, compensation claims against the state […] and some cases of public employment now fall within the bounds of the right to a fair trial.[135]

The right or obligation must arguably be recognized under domestic law[136] and for the article to apply, there must be a dispute either between private individuals or between an individual and the state the outcome of which will determine the individual's civil rights and obligations. Either the proceedings must directly determine the civil right or obligation or must involve a decision which itself is decisive as to such rights or obligations.[137] Where the relevant dispute is in the first instance determined by way of an administrative decision, the critical issue will be whether judicial review or in some circumstances an appeal on the merits is available before a tribunal that itself complies with the Article 6 requirements.

There are numerous kinds of decision that are undertaken during periods of armed conflict and that are of the kinds referred to in Article 6 ECHR. Consider, for example, disciplinary proceedings against prisoners of war. If the allegation is in the nature of a criminal charge attracting criminal law sanctions, the Article 6 rights would seem to apply. If, however, the allegation and the available punishment fall below that associated with a criminal charge, for example because the matter is purely disciplinary in nature and the maximum available punishment lacks characteristics of criminal punishment, there would be an argument that the requirements of Article 6 would not be capable of applying.

Consider then the making and review of civilian internment decisions under Geneva Convention IV.[138] Such a decision has the effect of determining whether the individual should be deprived of liberty and would thus, on the face of it, engage the civil rights and obligations of the affected individual. Whether Article

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[130] *Golder v. UK* A18 (1975); I EHRR 524 PC.

[131] *Buchholz v. Federal Republic of Germany*, A 42 (1981); 3 EHRR 597.

[132] *CD v. France* (2003) available at www.echr.coe.int/echr/.

[133] *Barthold v. Federal Republic of Germany*, A 90 (1985); 7 EHRR 383.

[134] *Pretto v. Italy*, A 71 (1986); 6 EHRR 182 PC.

[135] Harris et al. 2009, p. 222.

[136] *H v. Belgium* A 127-B (1987); 10 EHRR 339, para 40 PC. As Harris et al. 2009, point out at p. 224, "Article 6 does not control the content of a state's national law; it is only a procedural guarantee of a right to a fair hearing in the determination of whatever legal rights and obligations a state chooses to provide in its law".

[137] *Ringeisen v. Austria* A 13 1971; 1EHRR 455.

[138] Geneva Convention IV, Articles 42 and 43.

6(1) would actually apply or whether the law of armed conflict, and in particular Article 75 of API, will apply will depend on whether the specific circumstances of the case render the application of one or the other set of rules more appropriate. It could, perhaps, be argued that if the proceedings are taking place suitably distant from the hostilities and in conditions, including by reference to security, that render the application of Article 6(1) requirements militarily and practically feasible, then Article 6 will apply. If, however, the decision must of necessity be made in circumstances where, for example, hostilities are ongoing, imminent, recent or where the security situation is such that it is not militarily or practically feasible to apply all requirements of Article 6, the law of armed conflict should be applied. On balance, the more sensible approach would seem to be, for example in the case of internment or assignment of residence under Geneva Convention IV, that human rights law should be employed to identify the issues that should be addressed in the detention regime, but that pragmatic answers to those issues should be found, being answers which will not necessarily be, and which should not necessarily be required to be, normal human rights law solutions.[139]

9.4.3 Respect for Private and Family Life

The right to respect for private and family life, home and correspondence[140] is subject to the exception, so far as is relevant to the current discussion, 'such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety … for the prevention of disorder or crime … or for the protection of the rights and freedoms of others'.[141] One can imagine potential conflicts between this right and, for example, the provision in Geneva Convention IV permitting a detaining power to restrict the number of letters and cards sent by an internee.[142] If the detaining power's decision is based on one of the factors listed in Article 8(2) of the European Convention, then arguably no difficulty would exist. Similarly, if it is determined that the persons detained are, for whatever reason, not within the jurisdiction of the relevant state under Article 1 of the European Convention, again arguably no difficulty would exist because the law of armed conflict alone would apply. If, however, the jurisdiction requirements of Article 1 are satisfied and the decision to restrict correspondence is not based on a criterion referred to in Article 8(2), the circumstances applying in the particular location will determine whether Article 8 or the rule in Article 107(1) of Geneva Convention IV applies.

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[139] Discussed in correspondence between the author and Francoise Hampson, 2 July 2013.

[140] ECHR, Article 8(1). This right is susceptible to derogation in accordance with Article 15.

[141] ECHR, Article 8(2).

[142] Geneva Convention IV, Article 107(1).

However, it would seem sensible that a decision to restrict the correspondence of prisoners of war in accordance with Geneva Convention III[143] and, indeed, decisions to censor it[144] should be considered exclusively by reference to law of armed conflict considerations.

9.4.4 Freedom of Thought, Conscience and Religion

The right to manifest religion or belief in worship, teaching, practice and observance[145] is subject to certain limitations. These, so far as relevant, must be prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order or for the protection of the rights and freedoms of others. If, say, religious teaching takes the form of incitement to violence or public disorder, this limitation of the right would seem to apply. There are, however, likely to be difficult and potentially fine distinctions to be made here, and those distinctions are likely to become more sensitive in time of relevant armed conflict.[146]

9.4.5 Freedom of Assembly

Article 11 of the European Convention confers the right to freedom of peaceful assembly. The only restrictions of that right that are pertinent to the current discussion and that are permitted are those that

> are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health … This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.[147]

In the European Court case of *Osmani v. Former Yugoslav Republic of Macedonia*,[148] it was held that the applicant's speech delivered at a public meeting and

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[143] Geneva Convention III, Article 71(1).

[144] Geneva Convention III, Article 76(1).

[145] ECHR, Article 9(1).

[146] If, for example, religious teaching within a prisoner of war camp takes a form which breaches regulations issued under Article 41(2) of Geneva Convention III, for example by inciting the prisoners to disrupt the proper operation of the camp, it is arguable that such activity does not come within the limitations provided for in Article 9(2) and that the provisions of the law of armed conflict ought to apply.

[147] ECHR, Article 11(2).

[148] *Osmani v. FYRM*, Case number 50841/99.

other actions played a significant part in subsequent violence and that the violent nature of the subsequent events rendered punishment awarded by the relevant court proportionate. Proportionate or not, violent demonstrations are not protected by Article 11. Accordingly, if during an armed conflict in which a state has not derogated from Article 11 it can be shown that a demonstration is being organized with the purpose of causing disturbances, the assembly will not be protected by Article 11.[149]

Derogation from the right is possible under Article 15(2) of the European Convention. However, absent derogation, proportionate action to restrict the exercise of the right is likely to be permissible if the restrictions are provided for in law, for example by the domestic law of the state, and if the measures taken are necessary for the accomplishment of the relevant purpose referred to in Article 11(2).

So, if no derogation is made and no violence is anticipated, demonstrations may only be prohibited or restricted during an armed conflict if the law so provides and if the prohibition is necessary for national security or public safety, to prevent disorder or crime, to protect health or morals or to protect the rights and freedoms of others. The positive obligation is on the state to protect the exercise of the right to peaceful assembly. Moreover, it will be for the state to establish the circumstances justifying any restriction of the right and to show that the law provides for the prohibition.

9.5 Factors to Determine When Human Rights Law Applies in Armed Conflict

Overall, it is clear that application of the 'specific rules in specific circumstances' approach discussed earlier will not enable the preparation of a series of lists of activities that will be regulated exclusively by the law of armed conflict, of those that will be regulated exclusively by human rights law and thirdly, of those that will be regulated by both. More generally, it is suggested that the following factors would seem to be relevant when determining whether human rights law or the law of armed conflict ought to apply to a particular situation.

Activities closely connected with the actual conduct of armed conflict hostilities, or for which particular considerations justify its application,[150] should be regulated exclusively by the law of armed conflict.

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[149] *Christians against Racism and Fascism v. UK*, Case Number 8440/78.

[150] An example would be the application of the law of armed conflict in relation to prisoner of war handling arrangements, including when prisoners of war are being held remotely from the scene of ongoing hostilities.

If the activity, though undertaken at a time of armed conflict, is unconnected with the conduct of hostilities or of the armed conflict, domestic and human rights law should apply.

In the spectrum of activities and situations that lie between these examples, the judgment as to which body of law applies must be based on the characteristics of the activity or situation in question. The more closely connected the situation or activity is to the prosecution of hostilities, the greater the justification for applying the *lex specialis* of the law of armed conflict. The more that the decision, activity or situation has in common with the peacetime relationship between the citizen and the state, whether because of the remoteness of the location of the activity or decision from, and its lack of connection with, combat or because of some other circumstance, the more appropriate it is that human rights law norms be applied.

If, in a situation to which the law of armed conflict ought according to these criteria ordinarily to be applied only the law of armed conflict provides rules that are relevant to the activity in question, they should of course be complied with. If in such a situation only human rights law provides rules that would be relevant to the particular situation, those rules should be applied if the factual circumstances are such that their application will not disturb the vital balance between considerations of military necessity and humanitarian concern. However, circumstances may arise, for example during non-international armed conflicts, in which specific law of armed conflict rules may be lacking but a more satisfactory outcome would be achieved by applying by analogy law of armed conflict rules relating to international armed conflict.

9.6 Other Human Rights Law Treaty Regimes

The discussion so far in this chapter has focused on the provisions of the European Convention. In this section, we will look briefly at the provisions of greatest apparent relevance in some other human rights treaties.

9.6.1 International Covenant on Civil and Political Rights[151]

States party to the Covenant undertake 'to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant'. This draws immediate parallels with the European Convention, in that the first stated basis for the applicability of the Covenant is the territorial location of the individual while the second is the familiar notion of jurisdiction.[152]

[151] The Covenant was adopted in December 1966.

[152] ICCPR, Article 2(1).

States party must take necessary action to 'give effect to the rights recognized in the […] Covenant'.[153] States party undertake 'to ensure that any person whose rights or freedoms as […] recognized [in the Covenant] are violated shall have an effective remedy', even though that violation may have been committed by a person acting in an official capacity.[154] They must ensure that any person claiming such a remedy must have his rights determined by a competent authority provided for in that state's legal system. States must also make sure that the competent authorities enforce those remedies when they are granted.[155]

Article 4(1) provides that 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed' states party may derogate from their obligations under the Convention 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law' and do not involve discrimination on specified grounds. Derogation is not, however, permitted, so far as relevant to the current discussion, in respect of Articles 6 (right to life), 7 (prohibition of torture, cruel, inhuman or degrading treatment), 8(1) and (2) (prohibition of slavery and servitude), 15 (no criminal liability for an act which did not constitute a crime when committed) and 18 (freedom of thought, conscience and religion).[156]

The right to life is expressed as: 'Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life'.[157]

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[153] ICCPR, Article 2(2).

[154] ICCPR, Article 2(3)(a).

[155] ICCPR, Article 2(3)(b) and (c).

[156] ICCPR, Article 4(2). Note Yoram Dinstein's view that the lawfulness of acts causing death in wartime must, even from the perspective of human rights law, be looked for elsewhere, namely in the law of international armed conflict; Dinstein 2010, p. 23. Sven Peterke links the common Article 3 threshold with these human rights law derogation provisions; "the minimum threshold for a public emergency, even if the norms set for that may be lower than that of Common Article 3, requires a very serious situation ("life of the nation") which objectively destabilises the government and the functioning of core State institutions"; Peterke 2010, p. 180 citing Fitzpatrick 1994, p. 56. Consider also Human Rights Committee General Comment No. 29, States of Emergency, which addresses the power to derogate under Article 4 of the International Covenant. Paragraph 3 observes that "[d]uring armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in Articles 4 and 5, para 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by Article 4." Frequently, therefore, if derogation is appropriate, the law of armed conflict will apply.

[157] ICCPR, Article 6(1).

As to the term 'arbitrarily', Nils Melzer considered the practice of the UN Human Rights Committee,[158] the Inter-American Commission of Human Rights,[159] the Inter-American Court of Human Rights[160] and the African Commission on Human and Peoples' Rights,[161] and identified the following elements.[162]

There is a requirement of sufficient legal basis. A deprivation of life is therefore arbitrary either when there is no legal basis for using lethal force or where its use 'is based on a law which does not strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a state'.[163]

There is also a requirement of necessity, meaning that a deprivation of life is arbitrary 'when it is caused by force exceeding what is necessary to maintain, restore, or otherwise impose, law and order in the circumstances of the case'.[164] It follows from this that if the force used is greater than is necessary to maintain law and order or to maintain the security of all, it will breach the provision. Not only must the force used not exceed the minimum necessary to achieve the lawful purpose; the person against whom it is used must continue to represent a threat justifying the use of lethal force.

The force that is used must be proportionate to the danger that is posed.

The 'deprivation of life is "arbitrary" if it could be avoided by taking reasonable precautionary measures'. If the circumstances allow it, a warning and an opportunity to surrender should be given. If suspicion of possible involvement in crime is the basis on which an individual is perceived as a threat and on which a deprivation of life occurs, that deprivation is 'arbitrary' because due process is being denied.[165]

The Covenant obliges the state to enact legislation and to operate it in such a way as to secure to all individuals within its jurisdiction the inherent right to life.

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[158] Cases cited in the discussion include *Suarrez de Guerrero v. Columbia*, Communication No. R11/45 of 31 March 1982, UN Doc. Supp. No. 40 (A/37/40) U*NHRC and Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148-54/1983 of 10 April 1984, UN Doc. Supp. No. 40(A40/40) (UNHRC).

[159] The cases cited include *Chumbivikas v. Peru*, Case No. 10.559, Report No. 1/96, 1 March 1996, and *Alejandre et al. v. Cuba*, Case No. 11.589, Report No. 86/99, 29 September 1999.

[160] Cases cited include *Neira Alegria et al v. Peru*, Judgment of 19 January 1995 (Ser C No. 21, 1995), *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, (Ser C, No. 101, 2003).

[161] Cited cases include *Civil Liberties Organisation v. Chad*, Communication No. 74/92, Decision of 11 October 1995, and *Ouédrago v. Burkina Faso*, Communication No. 204/97, Decision of 1 May 2001, 29th Ordinary Session, April/May 2001.

[162] Note, Nils Melzer was considering the matter in the context of extra-judicial killings in the course of law enforcement operations.

[163] Melzer 2008, p. 100. Melzer concludes that a pattern of extra-legal killings fostered or tolerated by the state creates an environment incompatible with effective protection of the right to life.

[164] Melzer 2008, p. 101.

[165] Melzer 2008, pp. 101–102.

The Covenant requires that when states party deal with security situations they must respect and ensure to all persons within their jurisdiction the inherent right to life, making sure that nobody is arbitrarily deprived of his life. Importantly, Nils Melzer expresses the view that no significant discrepancy exists between deprivations of life that would be regarded as unlawful under ECHR and those that would be regarded as unlawful under ICCPR.[166]

9.6.2 *United Nations Universal Declaration of Human Rights*[167]

The provisions of the UN Universal Declaration that seem to be of particular relevance to the present discussion are Articles 3 (the right to life, liberty and security of person), 5 (prohibition of torture, cruel, inhuman or degrading treatment), 9 (prohibition of arbitrary arrest, detention or exile), 10 (right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charge), 11 (presumption of innocence), 12 (prohibition of arbitrary interference with privacy, family, home or correspondence and of attacks on honour and reputation) and 17 (prohibition of arbitrary deprivation of property).

The Universal Declaration permits only such limitations on the exercise of the rights and freedoms it recites 'as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.[168]

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[166] Melzer 2008, p. 118. Francoise Hampson points out, however, that the focus of Article 6(1) of the International Covenant on whether the deprivation of life was arbitrary implies greater flexibility than the restricted list of circumstances in which deprivation of life is not considered to be inflicted in contravention of Article 2 of the European Convention. What is considered to be arbitrary in peacetime may not be regarded as such during armed conflict; correspondence between Francoise Hampson and the author, 2 July 2013.

[167] The United Nations Universal Declaration of Human Rights was adopted by the General Assembly in December 1948 (Universal Declaration). Its provisions are not regarded as legally binding, save to the extent that they reflect customary law.

[168] Universal Declaration, Article 29(2). Interestingly, the Universal Declaration includes no right to derogate by reference to situations of armed conflict or other national emergency.

9.6.3 American Convention on Human Rights[169]

The right to life is expressed in Article 4(1) of the Convention in the following terms: 'Every person has the right to have his life respected. This right shall be protected by law … No one shall be arbitrarily deprived of his life'. The 'obligations flowing from the right to life necessarily entail a duty of the State to investigate deprivations of life on the part of its agents, and that non-compliance with this duty may in and of itself amount to a violation of the right to life'.[170] Citing the *Abella* case, Nils Melzer notes that to be effective, an investigation must be 'immediate, exhaustive and impartial as well as independent in hierarchical, institutional and practical terms'[171] and it must be open to public scrutiny. The *Abella* case is authority for holding that the duty to investigate extends to hostilities in non-international armed conflict[172] and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded that the obligation to investigate 'alleged violations to the right to life… does not cease to apply during armed conflict'.[173] Nils Melzer, having acknowledged that 'a situation of armed conflict may require the interpretation of the right to life in accordance with the *lex specialis* of IHL', comments that it does not suspend 'the applicability of the right as such, nor the corresponding duty to investigate deprivations of life on the part of State agents'.[174] In subsequent discussion, Melzer acknowledges that lack of territorial control may limit a state's obligation to respect the right to life, in which case the duty to investigate would be limited to alleged violations of that duty. He also accepts that full scale investigation of each targeted killing of a person of undisputed combatant status is not appropriate, but suggests this is conditional on absence of alleged or reasonable doubt as to the lawfulness of the operation. Moreover, he suggests that attacks against directly participating civilians should always be investigated as the claim that they are directly participating is, as he puts it, almost inherently doubtful. He concludes that the duty to investigate cases of targeted killing legally attributed to a state is only excluded for operations directed against a person of undisputed combatant status and in respect of which there can be no reasonable doubt as to the compliance of the operation with the law of armed conflict. While the author has no reason to doubt the accuracy of Melzer's analysis

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169 American Convention on Human Rights, San Jose, 22 November 1969.

170 Melzer 2008, p. 431, where the point is made that all major human rights bodies have taken this position, citing, inter alia, the Inter-American Court of Human Rights case of *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988 (Ser. C, No. 4 1988), para 166 and the Inter-American Commission of Human Rights case of *Abella v. Argentina* (*La Tablada*), Case Number 11.137, Report Number 55/97, 18 November 1997, para 244.

171 Melzer 2008, p. 432 and *Abella* case, n. 170, para 412.

172 *Abella* case, n. 170 above, para 181.

173 UN Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 8 March 2006 (E/CN.4/2006/53), available at www.unhcr.org/refworld/docid/45377b100.html, para 60.

174 Melzer 2008, p. 432.

of the human rights court authorities, he does doubt that many, if any, states actually involved in armed conflicts are consistently applying the investigation requirement he has put forward.

Put briefly and so far as is relevant to the current discussion, the American Convention prohibits torture and cruel, inhuman or degrading treatment[175]; establishes the right to personal liberty which may only be withdrawn in accordance with the constitution or with laws pursuant to the constitution[176]; grants the right to a fair trial by a competent, independent and impartial tribunal in the determination of a criminal accusation or of rights or obligations, whether civil or otherwise[177]; grants a freedom from ex post facto laws[178] and the right of a person to enjoy his property, subject to subordination by the law in the interest of society.[179]

Derogation is provided for in Article 27(1), but no derogation can be made, inter alia, in respect of Articles 4 (right to life), 5 (right to humane treatment), 9 (freedom from ex post facto laws) and 17 (rights of the family).[180]

9.6.4 African Charter on Human and Peoples' Rights[181]

The right to life is expressed in Article 4 of the African Charter as: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. Torture, inhuman and degrading treatment and slavery are cited as examples of exploitation and degradation of man which are prohibited by Article 5. The right to liberty and security of person is complemented in Article 6 by a prohibition: 'No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'. The right to have a cause heard and fundamental safeguards of a fair trial are to be found in Article 7

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175 American Convention, Article 5(2).

176 American Convention, Article 7(1) and (2).

177 American Convention, Article 8(1).

178 American Convention, Article 9.

179 American Convention, Article 21(1).

180 American Convention, Article 27(2). Note the Advisory Opinion of the Inter-American Court of Human Rights OC-8/87 dated 30 January 1987 which states that there can be no derogation from the right to simple and prompt recourse to a competent court to determine without delay the lawfulness of detention and to order release where detention is found to be unlawful. Careful consideration will also need to be given to the appropriateness under evolving human rights law of criminal trials of civilians before military tribunals. Note the decision of the European Court in *Cyprus v. Turkey* condemning the practice; *Cyprus v. Turkey*, 35 EHRR 731 GC, para 359 and finding VI(4). Careful consideration will also need to be given to the trial of criminal activities by members of the armed forces before courts other than civilian criminal courts.

181 African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981.

while property rights are guaranteed by Article 14 and may only be encroached upon in the interest of public need or the general interest of the community, in accordance with law.

The African Charter does not make specific provision for derogation.[182]

9.6.5 Other Human Rights Instruments

The discussion in Chaps. 8, 9 and 10 does not pretend to be a comprehensive treatise on the law of human rights. Rather, the focus has been on discussing what International Courts and eminent commentators have had to say about the relationship between human rights law and the law of armed conflict. Certain instruments that have not so far been mentioned are also of importance in the human rights law field. These include the Convention Against Torture,[183] the International Covenant on Economic, Social and Cultural Rights[184] and the Convention on the Rights of the Child.[185]

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[182] Karimova 2011, note 4.

[183] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations (Resolution 39/46) on 10 December 1984. It prohibits, in war or peace, any act whereby severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions; Convention Against Torture, Articles 1(1) and 2(2).

[184] The International Covenant on Economic, Social and Cultural Rights was adopted by General Assembly Resolution 2200A (XXI) dated 16 December 1966. The Covenant's provisions include the rights to self-determination, to the means of subsistence, to equal enjoyment of Covenant rights by men and women, to work, to favourable conditions of work, to an acceptable standard of living, to the highest attainable standard of physical and mental health, to education and to participation in cultural life.

[185] The Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989. It defines children as persons under 18 years old and requires that their rights be respected without discrimination and that they be protected against discrimination. In all actions involving children, their best interests must be the primary consideration. Children must be protected and cared for as necessary. The rights and responsibilities of parents, extended families and communities as provided by local custom, and of guardians, to provide direction and guidance to children must be respected. The Convention includes provisions as to the right to life, registration of births, the right of the child not to be separated from its parents against their will, illicit transfers of children abroad, the special protection of children who cannot remain in their family environment and matters relating to adoption. Under Article 38, states party must take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities and shall refrain from recruiting any person who has not attained that age into the armed forces. In recruiting any person under 18 years old into the armed forces, states party shall endeavor to give priority to those who are oldest; Article 38(2) and (3). There are

The Optional Protocol to the Convention on the Rights of the Child specifically addresses matters relating to children in armed conflict.[186] It requires states party to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities and to ensure that such persons are not compulsorily recruited into the armed forces.[187] It provides for raising the minimum age for voluntary recruitment into the armed forces and sets minimum safeguards for states permitting voluntary recruitment of persons below 18 years of age.[188] The prohibitions in the Protocol are stated also to apply to recruitment to armed groups that are distinct from armed forces of a state and there is an obligation to take all necessary legal, administrative and other measures to ensure effective implementation.[189]

9.7 The Permissible Degree of Force

It is appropriate in a chapter considering the interaction of the law of armed conflict and human rights law to ask whether the law of armed conflict places limits at the tactical level on the degree of force that may lawfully be used when undertaking an attack. As we have seen, when human rights law norms apply the use of lethal force is most restrictively constrained. In this section, we will consider the approach adopted by the ICRC to the issue of whether there is a limit to the degree of force that the law of armed conflict permits when undertaking attacks.

The language of the preamble to the St. Petersburg Declaration, 1868[190] and consistent state practice in many armed conflicts during the last one and a half centuries or more lead to the clear traditional view that the law does not prescribe the degree of force that is permissible in undertaking an attack. The nature of force that may be used is regulated by the law of armed conflict, for example by determining whether an object or person is liable to be made the object of attack, or is entitled to protection, but the use of overwhelming force to attack lawful

(Footnote 185 continued)
general obligations to respect and ensure respect for rules of international humanitarian law in armed conflict that are relevant to the child (Article 38(1)) and in accordance with the obligation to protect the civilian population in armed conflict, to take all feasible measures to ensure protection and care of children who are affected by an armed conflict (Article 38(4)).

186 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly Resolution A/Res/54/263 dated 25 May 2000 (Optional Protocol).

187 Optional Protocol, Articles 1 and 2.

188 Optional Protocol, Article 3.

189 Optional Protocol, Articles 4 and 6(1).

190 "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men;" Preamble to St Petersburg Declaration, 1868, paras 2 and 3.

objectives is and always has been lawful.[191] There have been suggestions that the damage caused by an attack should be minimized as far as possible[192] but the correct focus, in the author's view, should be on the rule in Article 57(2)(a)(ii) of AP1 in which it is civilian injury and damage that must be minimized.

Chapter IX of the ICRC Interpretive Guidance, 2009[193] is entitled 'Restraints on the use of force in direct attack'. In that chapter, the ICRC argues that irrespective of restraints on particular means or methods of warfare or under other branches of international law, 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'.[194]

Chapter IX acknowledges that, apart from prohibiting or restricting certain means and methods of warfare, international humanitarian law does not expressly regulate the kind and degree of force permissible against military objectives. The

[191] Consider the definition of military necessity in the Joint Service Manual of the Law of Armed Conflict, 2004 Edition (UK Manual): "the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war"; UK Manual, para 2.2 as amended. Consider also the discussion in the same text of the principle of humanity, defined as forbidding the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. The accompanying narrative makes the point that once a military purpose has been achieved, the principle of humanity renders unlawful the unnecessary infliction of further suffering; UK Manual, paras 2.4 and 2.4.1. There is, however, no objection at law to using such overwhelming force when undertaking an attack that the capacity of the enemy to strike back against the attacking force is extinguished. Equally, there is no legal objection to attacking lawful targets with so much force that enemy morale suffers and their willingness to undertake further military operations diminishes. The complex of military purposes and planned effects that may lead to a decision as to the manner in which an attack is prosecuted render the application of these principles at the tactical level to individual attacks, still less to parts of attacks, potentially misleading. In the author's view, the UK Manual explanation of the humanity principle deals with the matter correctly; once a military purpose has been achieved, the further infliction of suffering is unnecessary; UK Manual, para 2.4.1.

[192] See Report on Expert Meeting—Targeting Military Objectives, University Centre for International Humanitarian Law, Geneva, 12 May 2005, pp. 14–15.

[193] Melzer 2009 (Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, February 2009).

[194] Melzer 2009, p. 77; for a critique of the ICRC analysis, see Hays Parks 2010, 769–830. See also Corn et al. 2012, pp. 221–222, Corn 2010, pp. 78–84 and some general comments by Lubell 2005, p. 750. One should, perhaps, recall the famous words attributed to Lord Fisher on the Hague Conventions of 1899 and 1907; "The humanizing of war! You might as well talk of the humanizing of Hell….As if war could be civilized. If I'm in command when war breaks out I shall issue my order – 'The essence of war is violence. Moderation in war is imbecility. Hit first, hit hard, and hit everywhere'"; words attributed to Lord Fisher and cited in Green 2008, p. 21. Leslie Green draws attention to the Lieber Code, the Final Protocol of the Brussels Conference of 1874 and the Oxford Manual of 1880 all of which predate Lord Fisher's remarks and which recognize that the process of civilisation should have the effect of alleviating as far as possible the calamities of war; Green 2008, pp. 21–22.

chapter then points out that the definition of attacks[195] does not amount to a legal entitlement to kill persons who may lawfully be targeted. The chapter states that an absence of a right to kill, which at this point the narrative has not established, does not imply an obligation to capture rather than kill. Citing the principles of military necessity and humanity, the text reaches the conclusion that 'in conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances'.[196]

It is the application of these principles as if they were prescriptive rules of law that constitutes the chief error in Chapter IX.[197] Military necessity and humanity are not legal rules in their own right. They are, rather, the foundations on which the law of armed conflict, in which the applicable rules are to be found, is constructed. If, therefore, the law of armed conflict does not prohibit an act, military necessity and humanity cannot be cited as the basis for arguing that a prohibition exists.[198]

Chapter IX poses some scenarios.

> For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.[199]

An alternative example cited in the chapter is that of an unarmed insurgent commander visiting relatives inside government controlled territory. The conclusion that is drawn in Chapter IX is that 'it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force'.[200]

When the Group of Experts convened by the ICRC to discuss Direct Participation in Hostilities considered the matter, the draft text of what was to become

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[195] Under Article 49(1) of API attacks are defined as acts of violence against the adversary, whether in offence or defence. It is of course correct for the ICRC to point out that the focus of the definition is on clarifying the notion of attack rather than on stating the circumstances in which an attack is permitted or the degree of force that may be used.

[196] Melzer 2009, p. 79.

[197] As Jann Kleffner argues, military necessity and humanity do not constitute legal principles or rules. Rather, the law of armed conflict as a whole rests on the balance that states have struck at any given time between the two considerations, so each law of armed conflict rule manifests that balance; Kleffner 2012, p. 41.

[198] Jann Kleffner is right to note that the corollary is that military necessity does not operate so as to permit that which is prohibited by a specific rule of the law of armed conflict; Kleffner 2012, p. 41.

[199] Melzer 2009, p. 81.

[200] Melzer 2009, p. 82.

Chapter IX aroused considerable controversy and some hostility from some Experts.[201] There are logical weaknesses in the Chapter's analysis[202] and established state practice, as referred to earlier, calls the basic proposition into question.[203] When undertaking attacks in armed conflicts, states do not recognize an obligation to use minimum force[204] and often do not in fact use minimum force.[205] They may sometimes minimize force for policy but not legal reasons, for example to reduce post-conflict reconstruction work in which they will foreseeably participate (on a voluntary basis, usually, there being no general[206] legal obligation to repair after the war damage done to the enemy during it). Furthermore, states do not recognize in their practice in armed conflict an obligation to capture rather than kill those whom the law of armed conflict permits them to make the object of attack.

Continuing with substantially the same theme but this time in relation to the interpretation of 'military objectives', Henderson, while discussing UN operations, argues that if a conflict is undertaken with more limited purposes than the complete submission of the opposing party, attacks that do not serve to accomplish that limited purpose do not produce a definite military advantage 'in the actual circumstances of the conflict'.[207] It would of course be correct to say that the actual circumstances of the armed conflict as a whole will provide the correct overall context in which to evaluate whether undertaking a particular attack is militarily appropriate and wise in the circumstances. However, when deciding whether an attack is lawful, the law of targeting rules within the law of armed conflict must be applied, and the matter then to consider will be whether the person to be targeted is a combatant or directly participating civilian or, in the case of an object, whether its attack, in all the circumstances, strategic, operational and tactical, offers a

[201] Personal knowledge of the author who was a member of the Group of Experts from 2004 to 2008.

[202] Jann Kleffner, for example, makes the valid point that approaching the law of armed conflict from a permissive standpoint, i.e. permitting that which is not explicitly prohibited, is more in tune with its nature as governing a state of exception rather than normality; Kleffner 2012, p. 39.

[203] For a discussion of these issues see Hays Parks 2010; and Heintschel von Heinegg 2011, pp. 7–9; Heintschel von Heinegg and Dreist 2010, pp. 31–33 and for an alternative view, see R Goodman 2013 and consider Remarks by HH Koh, Legal Adviser, US Department of State, on 25 March 2010 at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law, available at www.state.gov/s/l/releases/remarks/139119.htm.

[204] Note for example the rejection by states of any notion that they are obliged to use available non-lethal options, Fidler 2005, p. 532 but see the discussion in Massingham 2012, p. 683.

[205] See for example Sassoli and Olson 2008, p. 606.

[206] The word 'general' recognizes that for states party to the Protocol there are particular assistance obligations in Protocol V to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW) in relation to explosive remnants of war.

[207] Henderson 2009, p. 152; see also Hampson 1992, p. 51 where the observation is made that there is at present no legal requirement to define the war aim.

definite military advantage. It is entirely possible that an object that one would for strategic reasons prefer not to attack must in the event be made the object of attack because of tactical level considerations. A decision whether to prosecute the attack will require commanders to decide where the balance of overall military advantage lies. Once it is established that, say, destruction of the object offers a definite tactical military advantage, the object is a military objective. Once the law of armed conflict's requirements are satisfied, the decision whether actually to undertake the attack is driven by policy rather than law.

Moreover, once an armed conflict is under way, events will not always proceed as either party may have planned them in advance.[208] It may be realistic at the outset of an armed conflict with limited political objectives to impose geographical or other constraints on targeting that are more restrictive than the law of armed conflict requires. This may remain a viable option during particular, even all, phases of the conflict if the enemy is and remains relatively supine thus permitting the use of force to proceed essentially unopposed and in accordance with previously formulated plans. If, however, the armed conflict broadens in scope and a more general conflict ensues, the classes, locations and categories of object and person that it will be necessary to attack in order to achieve the military purpose(s) will also become more numerous. Deciding, in such a developing situation, whether an object makes an effective contribution to military action and whether its destruction, capture or neutralization offers a definite military advantage are the issues that must be determined by reference to the circumstances, strategic, operational and tactical, ruling at the time. So when Henderson comments: 'the scope of the mandate will affect what is a military advantage that may lawfully be sought from any particular attack'[209] this should not be misinterpreted, perhaps simplistically, as necessarily constraining UN-mandated or other forces involved in such an operation in a manner not required by the applicable law.

9.8 Conclusion

In this Chapter we have considered what the international courts and commentators have had to say about the application of human rights law in times of conflict. We have explored the interaction of the law of armed conflict and human rights law and have reviewed proposals as to the extent of force that may be used under the law of armed conflict.

The debate on these matters may be vigorous. However, the importance of respect for individual human rights is being recognized increasingly widely both in peacetime and in times of war. Accordingly, recognizing the fundamental linkages between the law of armed conflict and human rights law and developing a

[208] This observation reflects the well-known military saying that 'no plan survives first contact with the enemy'.

[209] Henderson 2009, p. 154.

satisfactory, workable interaction between the two bodies of law so that during an armed conflict each is regarded as a manifestation of the other seems to be the way ahead. It is this interconnectedness of international humanitarian law and the international law of human rights that will, perhaps ironically, most powerfully ensure the continued relevance of, and enhanced support for, international humanitarian law norms.

Accordingly, in the next chapter we will narrow the focus specifically to consider armed conflict, and will try to formulate an interaction of these important bodies of law that will be operable and sensible.

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Chapter 10
Making Sense of the Human Rights Law/Law of Armed Conflict Conundrum: A Practical Proposal

Contents

10.1 The Relationship as Established in Contemporary Jurisprudence

The jurisprudence of the international courts and the writings of informed commentators led us in Chap. 9 to identify a relationship between human rights law and the law of armed conflict which we can summarize in the following propositions:

(1) Human rights law applies throughout periods of armed conflict.
(2) During armed conflict, whether a particular human right is breached may be determined by applying human rights law norms, or by applying law of armed conflict norms or it may be determined by applying a mixture of the two.

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_10,

(3) A determination of which norms, human rights, law of armed conflict or a combination, are to be applied in assessing whether the human right has been breached is achieved by reference to the specific rule that is being considered and to the specific circumstances of the case.
(4) The exact terms of the relevant human rights rule will depend on the language of the human rights treaty that binds the relevant state and on any associated jurisprudence.
(5) Whether the state has the power to derogate from the particular relevant human rights rule will also depend on the terms of the human rights treaty that binds the relevant state. The decision of a state as to derogation may be an important factor in determining the extent of its human rights law obligations.
(6) If there is no power to derogate from the relevant human rights rule or the state in question does not derogate from it, the rule will apply in the terms in which it is expressed in the human rights treaty, subject to amplifications or clarifications derived from decided cases, unless the specific rule and the specific circumstances are such that the law of armed conflict ought to provide the yardstick for determining whether the relevant human rights rule has been breached.
(7) Human rights issues associated with the conduct of hostilities pursuant to an armed conflict will generally be assessed by reference, exclusively, to the law of armed conflict.
(8) Activities which, though occurring at a time of armed conflict are unconnected therewith and to which human rights principles are applicable will generally be exclusively regulated by human rights law principles.
(9) Outside these two sets of circumstance, the more closely concerned the activity is with the conduct of armed conflict hostilities, the more appropriate it will be for the law of armed conflict to be applied exclusively to the matter. Where the linkage with the conduct of armed conflict military activities is tenuous or remote, the application of human rights law criteria may be more appropriate. Both sets of legal criteria may be relevant in particular circumstances. These are liable to arise where both bodies of law make provision of particular relevance to the circumstances, and where their joint application to the relevant issue is most likely to provide adequate safeguards for the rights or interests of the relevant individual while producing a basis of decision which takes properly and appropriately into account the relevant military circumstances.
(10) The law of armed conflict regulates the activities of states and of armed groups, indeed of all persons involved in an armed conflict. Human rights law regulates the relationship between the state and persons within its jurisdiction and does not usually address the relationship between armed groups and individuals.

10.2 Why is the Current Interpretation Unacceptable?

Arguably this is not a satisfactory state of affairs. The rest of this section will be devoted to explaining why. Clearly, the explanation of the current legal interrelationship given by Christopher Greenwood and summarized in Chap. 9 is absolutely correct as is Nils Melzer's analysis of the pivotal decisions of the human rights courts. Accepting that legal accuracy, the objection is based in large measure on practicality. There is no dispute with the commentators' summaries; the difficulty seems to lie with the courts' decisions on which those summaries are based.

Application of the 'specific rules in specific circumstances' approach is only going to be realistic if the 'circumstances' can be unambiguously categorized in advance as governed either by human rights law or, as the case may be, the law of armed conflict or by both. Similarly, if both sets of norms are said to apply to a circumstance, it will be necessary to be able to say in advance how this will work.[1]

This categorization process would effectively involve breaking down in advance of an operation each circumstance into a series of likely scenarios, and then determining in the context of each scenario: whether human rights norms or law of armed conflict norms should be applied; in each case, which is the relevant norm, right or freedom; and how it applies.[2] So, for example, in relation to logistic support in forward areas, or detention operations or requisitioning, one would have to list the various activities that will occur under each such category and the differing contextual factors that will determine whether human rights norms or law of armed conflict norms will be applied by reference to each of the human rights that may be relevant. In relation, for example, to detention operations therefore, one would have to determine in advance whether human rights norms or law of armed conflict norms or both regulate the application of each of the following, namely the right to

[1] In this respect, the author therefore agrees with Charles Garraway who identifies the need to determine which of human rights law or the law of armed conflict has priority in particular circumstances if, that is, one accepts that the complementary approach is not the answer. He suggests that in international armed conflict, priority should go to the laws of armed conflict, that in periods of occupation and non-international armed conflict, the boundaries between law enforcement operations and armed conflict are blurred and hard to define, with the result that the answer may be to look not at the technical classification of the armed conflict but at the level of violence within it; in low level non-international armed conflicts, human rights law should take priority in any conflict with law of armed conflict provision, while for other non-international armed conflicts of very high intensity, the law of armed conflict would prevail. He proposes a similar test in relation to occupation. Relatively low-key resistance, primarily individual attacks, imply human rights law having priority. High intensity resistance implies the law of armed conflict taking priority; Garraway 2012, pp. 110–111.

[2] It would also arguably involve a relatively wholesale rewriting of legal texts on the conduct of military operations. While texts such as the UK, German, Canadian and other Manuals on the Law of Armed Conflict would remain reliable as statements of the law of armed conflict, they would no longer be accurate representations of the law that should be applied in foreseeable operational circumstances and would require amendment to reflect the applicability of human rights norms.

life, the right to liberty and security, the right to a fair trial (e.g. as to prisoner of war status or in respect of any proceedings or administrative action concerning such individuals), the right to respect for private and family life (e.g. in relation to correspondence) and any other rights or freedoms that have relevance.

The resulting sequence of matrices is likely to be very complex and highly fact-dependent, and ensuring its accurate implementation by armed forces personnel, even those actively seeking to comply with applicable law, is inevitably going to be a challenging proposition. Cases for example in which a link with the hostilities exists but is less direct, or cases which seem more remote from the conduct of hostilities but for which the law of armed conflict makes specific provision seem likely to be the cases in which the factual or contextual circumstances in which the activity is undertaken will play a vital role in reaching this 'specific rules in specific circumstances' decision.

This factual or contextual aspect means that it may not be possible for a commander seeking to implement this 'specific rules in specific circumstances' approach to determine before an armed conflict begins, or before a phase of the conflict starts, or even before a particular activity connected with the armed conflict starts, which body of law will regulate specific tasks that the armed forces must undertake. This is simply because he may well not be in a position to know the relevant facts or circumstances at that operational planning stage. Consider the example of detention in the battle area of prisoners whose status as prisoners of war has not yet been determined. The difficulty becomes clear when we recognize that a sequence of events is likely to take place. The prisoner is taken, let us say, in the course of fighting and is held temporarily in the vicinity of combat until he can be withdrawn. That fighting of course may be of varying intensity. He may then be moved to a location which, though still not far from where combat is under way, is less threatened by enemy action and where he may be held for a further period. He may then be further moved to a less insecure place where his relevant details are obtained and prisoner processing is undertaken. Thereafter, his removal from the combat area to a thoroughly secure prisoner of war camp located in an area suitably distant from hostilities may take time, as dictated by the requirements of ongoing combat operations. Each of these locations, and the transport arrangements from one to the next, are likely to present progressively diminishing challenges to the potential application of human rights norms to the individual's detention. Nevertheless, in all such phases of detention, the law of armed conflict makes specific, sometimes particularly detailed provision. Moreover, the security situation that exists in each of these locations is itself liable to change over time, and the detained persons may have diverse statuses with the result that differing regimes within each body of law may apply to them.[3]

[3] Consider Sassoli and Olson 2008, pp. 616–623 where the difficulties associated with the application of the human rights law norms as lex specialis are discussed and the conclusion is reached that those norms would render it impossible for non-state actors to intern legally. The point is made that if relevant legal rules make it impossible for a party to the armed conflict to fight efficiently, those rules will not be respected; Sassoli and Olson 2008, pp. 622–623.

So we start to conclude that it will not be practically possible for a commander to apply the 'specific rules in specific circumstances' approach by prescriptively determining in advance of the operation, or even in advance of the commencement of the relevant element of the operation, which of these phases of detention will be governed by the law of armed conflict and which will be governed by human rights law and which will be governed by both. It would only be once the security situation and other relevant factual circumstances at each location on any particular occasion are known that one would be able with confidence to say that in that specific circumstance, the law of armed conflict or, as the case may be, human rights law norms or both ought to be applied.

This, frankly, while it may be appealing in legal theory, will not work in practice. Commanders and their personnel must be in a position of knowing what rules apply in advance of the start of an operation. Only if the rules of the activity are known in advance will it be possible to train the participating personnel appropriately. Only if the rules are known in advance will it be possible to issue appropriately expressed rules of engagement or other operational instructions and guidance. Only if the applicable norms are known in advance can the legal adviser to the commander give his client accurate advice on the orders he should give, on the action pursuant to them that is lawful and on whether action actually undertaken should result, for example, in disciplinary action.

As we noted above, implementing such a process would involve generating sets of matrices or charts in which all of the foreseeable permutations would need to be reflected. The author sees little or no prospect of such a process producing an internationally agreed outcome, and doubts very much whether states would even be prepared to make the attempt. The consequence is that individual states will make what may well be mutually contradictory determinations thus further eroding any notion of a common legal interpretation. So we can conclude that this version of the 'specific rules in specific circumstances' approach is unrealistic and inoperable. It would, moreover, be hard to conclude that unrealistic and inoperable arrangements nevertheless reflect the law.[4]

Non-international armed conflicts are, as we have seen, the more numerous class of contemporary armed conflict and activities of armed groups involved in such conflicts are not generally regulated by human rights law. In an armed conflict between government forces and an armed group, only one side in the conflict could be bound, therefore, by human rights law rules; to the extent that human rights law is deemed to apply, this would therefore produce a potential imbalance in the legal obligations of the parties. Where the conflict is between armed groups and does not involve government forces, any activities deemed to be exclusively regulated by human rights norms would remain entirely unregulated, which would also seem to be an unsatisfactory state of affairs.

[4] Note in this context Geoff Corn's view that resistance within the profession of arms is liable to continue unless the application of human rights law in the context of armed conflict is "animated by a proper balance between humanitarian and military interests"; Corn 2010, p. 56.

10.3 The Sources of International Law

It is perhaps appropriate at this point to recall the respective roles of states, commentators and international courts in relation to the formation of international law. The Statute of the International Court of Justice lists the sources of international law as follows:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to [the decision of the Court has no binding force except between the parties and in respect of that particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[5]

Accepting that item (c) will usually be encompassed in the customary law rules referred to in (b), the primary sources of international law, and thus of the law of armed conflict, are treaty law and custom.[6] Judicial decisions are a subsidiary way of identifying rules; they do not therefore introduce rules that have not been agreed between states either as a treaty text or by virtue of general practice recognized as reflecting the law. Judicial decision-making is not law in its own right, nor is it independent of the law. It is, along with the authoritative writings of qualified publicists, a most important aid to determining what the law is. If, however, a conflict were to exist between a rule of customary or treaty law and a judicial decision, the treaty or customary law rule must, it seems, prevail.

10.4 Which Body of Law Have States Agreed Should Apply in Armed Conflicts?

We should therefore consider what states have agreed as to the law that should apply in the particular case of an armed conflict. In the early law of war, as it then was, treaties were stated to apply in the case of a war between states party. Thus, the Expanding Bullets Declaration, for example, stipulates: "The present Declaration is only binding for the contracting powers in the case of a war between two or more of them." Article 2 common to the Geneva Conventions 1949 provides that those Conventions "shall apply to all cases of declared war or of any other armed conflict" between states and to all cases of partial or total occupation. Article 3 common to the same Conventions provides that states party shall be

[5] Statute of the International Court of Justice, San Francisco, 26 June 1945, Article 38 incorporating Article 59.

[6] UK Manual, para 1.11.

bound to apply the Article "as a minimum" in an armed conflict not of an international character occurring in the territory of one of them. Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API) "shall apply in the situations referred to in [Common] Article 2…"[7] and Additional Protocol II applies "to all armed conflicts which are not covered by Article 1 of" API.[8] The Conventional Weapons Convention and its annexed Protocols "shall apply to situations referred to in" common Article 2,[9] and was, by amendment, extended in scope to cover "situations referred to in" Common Article 3.[10]

The circumstances in which the human rights law treaties are stated to apply can include armed conflict. This is what states have specifically agreed, so it is the agreement of states that has produced the complex, in some respects contradictory, arrangements that we are now trying to resolve. There is, however, a distinction to be made between the position in international armed conflict and that applying to non-international armed conflict. In the former, the law of armed conflict treaty rules ought generally to apply as written in the respective treaties. That, after all, is what states have agreed by specific reference to situations of international armed conflict. If human rights law principles can be applied to the manner in which acts or decisions prescribed by the law of armed conflict are undertaken or implemented,[11] and if such application of human rights law principles has no detrimental effect on the application of the law of armed conflict rule or, indeed, on military operations or effectiveness, such principles ought to be applied but, it is suggested, as a matter of best practice.

In non-international armed conflict, the language in common Article 3 and in Article 1(1) of Additional Protocol II is also mandatory. This means that the rules in those instruments, and in instruments that express their scope of application by reference to those provisions such as the 1954 Convention and the Conventional Weapons Convention, must be applied as written to non-international armed conflicts. However, note should be taken of the 'as a minimum' language in common Article 3. This may suggest to some observers that there is greater scope in non-international armed conflict for human rights law norms to be applied to

[7] API, Article 1(3).

[8] There are, as we saw in Chap. 2 additional conditions that must be met for an armed conflict to come within Additional Protocol II.

[9] The 1954 Hague Cultural Property Convention's application to international armed conflicts and to occupation is expressed in similar terms to those in common Article 2 of the Geneva Conventions.

[10] Amendment adopted at the December 2001 Conventional Weapons Convention Review Conference.

[11] Note that a state's legal obligations under Human Rights treaties are not legally shared by the non-state party, save when "stable control over a part of national territory that has enabled them to develop and perform government-like functions" exists; Pejic 2012, p. 83; see also Kleffner 2010, pp. 67–68.

'fill the gaps' in law of armed conflict provision, gaps which are more numerous and extensive than is the case in relation to international armed conflicts.[12] It would, as noted in Chap. 9, be highly desirable for these gaps to be filled by states adopting a new and more detailed law of armed conflict treaty. However, the development and clarification in recent years of customary law with reference to non-international armed conflict means that the effective gaps in the law relating to such conflicts are significantly narrower than a mere perusal of common Article 3 and of Additional Protocol II would suggest. Where such gaps exist, adapting human rights law norms for this gap-filling purpose should be done with circumspection and some hesitancy, recalling that applying by analogy rules applicable in international armed conflict may produce the better outcome. Only if an adapted human rights law norm can be applied consistently with the unusual circumstances of armed conflict may such adaptation be legitimate.[13]

10.5 The Pure Lex Specialis Interpretation

There are many in the profession of arms who consider that in relation to both international and non-international armed conflict, states have agreed a specific set of rules, the law of armed conflict, which should be applied as written. Rather than talk in terms of human rights law applying at all times with the applicable norms taking law of armed conflict form in particular circumstances, these observers would hold that the law of armed conflict has primacy. The law of armed conflict treaties and customary rules are undoubtedly a primary source of the law and adherents to this approach would therefore conclude that it should only be where the law of armed conflict treaties or customary rules are silent on a matter, or have been rendered irrelevant by the passage of time or events, that human rights law may have a role, as a subsidiary body of law. Such observers would, however, apply the caveat that the application of human rights principles will only be required when to do so is practical, reasonable in the prevailing military circumstances and consistent with the application of the primary law of armed

[12] Geoff Corn comments that as the law of non-international armed conflict is not nearly so comprehensive as that applying to international armed conflicts, it is logical and seen by some as necessary to look to human rights law to inform interpretation of the law of armed conflict and add flesh to the bones of its regulatory framework; Corn 2010, p. 62. Marco Sassoli and Laura Olson point to the similarities in the results achieved by the two bodies of law in non-international armed conflicts; similar prescriptions as to the treatment of persons in the power of a state, similar judicial guarantees at trial (though more developed in human rights law) and even, in the case of the Chechnya and eastern Turkey jurisprudence of the European Court, similar results as to the precautions to be taken for the protection of civilians; Sassoli and Olson 2008, pp. 600–601.

[13] See Melzer 2010, pp. 280–281 and consider for example Doswald-Beck 2006. See also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 dated 22 October 2002, para 61.

conflict rule. So, they would say, where there is a law of armed conflict norm covering a point, it must be complied with because that is the lex specialis that states have agreed. In that sense, the law of armed conflict would have primacy, and human rights principles may have a potentially important, but nevertheless subsidiary, role.

If that is how some observers would like the position to be, it is not how many see the law. It is worth contemplating how this state of affairs has come about. States, it will be appreciated, are at the centre of the formation of international law. States make treaties and it is the practice of states, informed by their appreciation of a legal obligation so to act, that forms the basis of customary law. States have made no treaty provision explicitly stating that the law of armed conflict should be subsidiary to human rights law, and repeatedly in law of armed conflict treaties assert the continuing applicability of law of armed conflict norms.[14] It is the decisions of international courts, including human rights courts, that have produced this idea that human rights law has primacy and that the law of armed conflict should be relegated to a subsidiary aid to the interpretation of continuously applicable human rights and freedoms. It is not, however, easy to reconcile the views of the judges with what the underlying law seems to be, given that the result of those judgments is a legal relationship that may, on occasion, be difficult to apply.

Moreover, the inter-relationship between human rights law and the law of armed conflict is not a regional issue and thus not a matter on which the decisions of regionally based courts can bind all states. Certainly the decisions of regional human rights courts can, to the extent that the treaty establishing the particular court permits this, determine issues that fall to be decided under that human rights treaty regime. Moreover, to the extent that there is commonality of provision between human rights treaties, a decision by one regional human rights court may be expected to inform decisions by other regional human rights courts as to the adjudication of similar factual circumstances by reference to similarly expressed rights or freedoms. It would, however, be an error to interpret that process of cross-fertilization as defining the relationship between human rights law as a whole and the law of armed conflict.

This all suggests that:

- the oft-cited notions of lex specialis and lex generalis ought to define the relationship at the global, international law level;
- in the peculiar circumstances in which the law of armed conflict applies, it should have primacy; and
- human rights norms should have a filling-in role in circumstances where, cumulatively, gaps in the law of armed conflict exist; the military and other circumstances render such application consistent with the maintenance of the balance between military necessity and humanitarian concern; the application of

[14] For a recent example, see the final preambular paragraph to the Cluster Munitions Convention, 2008.

human rights law does not counteract the application of some other law of armed conflict rule; and a better outcome would not be provided by application by analogy of a corresponding rule applicable to international armed conflict.

10.6 The Need for an Alternative Approach

If the immediately preceding passages represent the author's preference as to what the law should be, this section recognizes that in all probability such a strong body of judicial and commentator opinion endorses the contemporaneous application of both bodies of law that contemporaneous application now represents the legal position. That is why the discussion in Chap. 9 started from that premise; in the rest of this chapter we will therefore develop an interpretation of contemporaneous application that might be easier to implement during military operations in armed conflict.

If, as seems likely, it is the contextual aspect of 'circumstances' that causes difficulty with the 'specific rules in specific circumstances' approach, is there an alternative interpretation of 'circumstances' that may overcome the problem?

Perhaps the only interpretation that would be practically operable would be hard to rationalize with some aspects of the ICJ approach and with most aspects of the European Court of Human Rights approach in *al Skeini*. Thus, if 'circumstances' were to be interpreted as referring to broad generic categories of activity, for example combat, combat support, battlefield logistics, requisitioning, rear area logistics, detention operations in the area of hostilities and detention operations in secure areas remote from hostilities and so on, and if there were to be legal clarity as to which legal norms apply to which category of activity irrespective of the factual circumstances that apply on a particular occasion, that may be capable of practical application by armed forces personnel and their commanders, assisted by their legal advisers.

It would involve dividing up into 'broad handfuls' all activities, military or civilian, that are in any way connected with an armed conflict and then specifying which body of rules applies to each. In short, the author agrees with Geoff Corn that it is essential to establish the point, or points, at which the lex specialis of the law of armed conflict must displace human rights standards[15] if, that is, there is to be any realistic prospect of applying the law sensibly in practice. He explains towards the end of his important Article[16] that some sort of pragmatic coexistence must be found between these two bodies of law. Marco Sassoli and Laura Olson are also right when they point out that "a flexible solution in which the actual behavior required depends on the situation, is dangerous—especially

[15] Corn 2010, p. 67.

[16] Corn 2010, pp. 90–94.

in our context where it has to be applied by every soldier and leads to irreversible results".[17] As they suggest, it is necessary to identify the factors that give precedence to, respectively, international humanitarian law and the law of human rights.

So we should now take up our classes of armed conflict circumstance and of armed conflict activity in the 'broad handfuls' manner that we have suggested with a view to determining what law should apply in what circumstances. That is what the author proposes to do now. There has now been more than enough fretting about how difficult this issue is. What is now required is the development of a framework in which activities associated with armed conflict are allocated between the two bodies of law on a basis that makes legal and operational sense.

Inevitably, what follows will produce a chorus of disapproval. The 'IHL supremacists' will see the proposals as 'selling the birthright'. Others will consider that human rights law norms should apply more widely. If both constituencies complain, that may suggest that roughly the right balance will have been struck. Above all, the debate needs to move on, and the proposals that follow are an attempt to achieve that.

10.7 A Suggested Framework for the Application of IHL and IHRtsL Norms

The following demarcation of activities and situations must of necessity be informed by the fundamental differences referred to earlier in this chapter, and by the generic practicalities of the specific situation or activity. The objective will be to achieve the sort of clarity that will enable Commanders to know what is allowed and, as the case may be, prohibited, for those commanders to instruct and train their troops as to the relevant rules, for superior commands and formations to be able to issue in advance of events Rules of Engagement that accurately reflect the applicable legal norms and for courts to be able to apply understandings and norms that are coherent with what, it is hoped, will become a widely accepted legal framework. In the immediately following sub-sections, therefore, we will consider particular classes of activity in the context of international and, unless stated otherwise, non-international armed conflict.

The factors that would seem to determine whether the law of armed conflict or human rights law should have precedence would seem to be:

Generally speaking, if the proper and effective regulation of a particular class of activity requires the balancing of considerations of military necessity with

[17] Sassoli and Olson 2008, p. 613. After a discussion of possible implementing approaches, Marco Sassoli and Laura Olson conclude, sensibly, with the rhetorical question if the permissible conduct varies according to the particular situation, how can the soldier know which rules to apply? The present author would suggest that this problem might suggest that the 'broad handfuls' approach proposed in the current chapter is the one that should be pursued.

humanitarian interests and concerns, then only humanitarian law should be applied.

If, by contrast, the focus of a particular activity is more closely related to, or analogous to, the rights of citizens in their dealings with the state, the tendency should be to regard international human rights norms as applicable.

The policy that it seems most sensible to apply is that articulated by Cordula Droege as follows:

> humanitarian law is the law most appropriate for the conduct of hostilities, because its norms on the use of force are based on the assumption that military operations are ongoing and that the armed forces have no definite control over the situation. Conversely, where the situation is remote from the battlefield and the state authorities have enough control over a situation to be able to carry out law enforcement operations, human rights law provides the most appropriate framework.[18]

Inevitably there will be exceptions and situations in between, which combine these two qualities, and it would seem that these may be the situations referred to by the ICJ in the *Wall* case as requiring the application of both bodies of law. Ensuring commanders, superior formations and troops know in advance what this blend of laws amounts to and what its implications are for military operations will be challenging, but an attempt should at least be made. Leaving it vague so that commanders and their advisers have no guidance on the matter is a recipe for legal confusion and breach. It is therefore of vital importance that, in the next section, we try to identify which body of law applies to each of the relevant activities and in which sort of context.

These then are the methodology and the policy that we shall seek to apply in the immediately following sub-sections of this chapter to various classes of armed conflict activity. Only a very few such activities will be addressed, but what appear to be the relevant criteria should emerge from the analysis.

10.7.1 The Conduct of Hostilities

Activities associated with the conduct of hostilities relating to an armed conflict are, and should be, regulated exclusively by the law of armed conflict. This will include, but is by no means limited to, the following activities:

- all decisions as to targeting of persons or objects, including the precautions to be taken before attack and against the effects of attacks;
- the determination of which persons and objects are entitled to protection from attack or to special protection and the obligations that such protection or special protection involves for attackers and for the persons concerned or, as the case may be, for the use of the objects concerned;

[18] Droege 2007, p. 347.

- the firing of weapons, military patrolling in any domain, sentry guarding of military facilities, military bodyguard duties and analogous activities;
- the undertaking of attacks associated with an armed conflict using any means or methods including cyber, environmental and outer space means, and irrespective whether the target of the attack is persons or objects, including the natural environment;
- taking defensive action against attacks;
- the designation of targets with a view to attack;
- platform supervision including fighter control and equivalent coordination activities, including the armed conflict activities undertaken in deployed combined operations cells;
- launching platforms that will undertake missions in furtherance of the military campaign;
- the preparation and loading of mission and weapons control data and mission essential equipment and supplies including ammunition, the loading of mission navigation data;
- the obtaining, collation, interpretation, distribution and use of all forms of intelligence;
- the preparation, amendment and implementation of plans relating to combat;
- the allocation of personnel, equipment and resources by military commanders in the course of ongoing military operations;
- decisions as to the conduct of the hostilities, including the determination of where attacks shall or shall not be undertaken, when and where activities will take place and the methods and means that shall be employed;
- command and control arrangements as between units;
- the appointment of personnel to units and the orders to be given to individuals as to the activities they are to undertake in connection with the conduct of hostilities;
- combat logistics;
- combat search and rescue;
- the undertaking of psychological operations associated with an armed conflict, the occupying, removal, destruction or use of buildings, objects and vehicles, land, and other things in association with the ongoing conduct of hostilities;
- the fixing of compensation arrangements associated with the previous serial;
- detention operations that are undertaken in the vicinity of hostilities, including the taking and holding of prisoners, the apprehension and holding of civilians, the questioning of prisoners, the treatment of prisoners, the safeguarding of prisoners, the transporting of prisoners, and any dealings with their property;
- arrangements associated with the search for, collection, care for and treatment of, respect for and protection of the wounded, sick and shipwrecked in, or in the vicinity of combat areas, on warships or on medical aircraft;
- deployment forward with a view to undertaking any of these activities;
- preparation for the undertaking of any of these activities;
- withdrawing after having conducted any of these activities;
- giving orders associated with the undertaking of such activities;

- assisting others to undertake these activities; and
- any other action that amounts to direct participation in the hostilities.

The conduct of hostilities for these purposes includes activities such as those listed above, that are undertaken in association with an international or non-international armed conflict.

The balance inherent in the law of armed conflict between military necessity and humanitarian considerations means that law of armed conflict criteria should determine, e.g. the status of persons as combatants, directly participating civilians, 'peaceable' civilians and persons *hors de combat* and the implications of such classification.[19]

While there will be foreseeable controversies as to the inclusion or omission of certain items from the list, it is suggested that 'conduct of hostilities' should be considered reasonably broadly. This would have the immediate effect that the principles and rules of the law of targeting, the prohibitions and restrictions in the law of weaponry, the protections afforded to civilians, to all persons *hors de combat* and to all persons and objects subject to specific protection including, for example cultural objects, objects indispensible to the survival of the civilian population, dams, dykes and nuclear electrical generating stations, medical and religious personnel and so on as set out in the law of armed conflict would continue to apply as written and to the exclusion of human rights law norms during the conduct of armed conflict hostilities. Training already given to armed forces personnel in these matters would remain valid, rules of engagement relating to such activities that are based on law of armed conflict prohibitions and restrictions would also remain lawful and the basis for issuing future orders and guidance in these matters would be clear.

[19] The author derives considerable support in this view from the *Abella* case. There it was determined by the Inter-American Commission on Human Rights that, in the context of a non-international armed conflict, civilians who attacked the Tablada base, whether individually or as a group, "are subject to direct individualized attack to the same extent as combatants"; Inter-American Commission on Human Rights, *Abella v. Argentina* (*Tablada*), Case No. 11.137, Report No. 55/97, 18 November 1997, p. 178. As Marco Sassoli and Laura Olson point out, the Commission then proceeded to apply international humanitarian law to the attackers; only attackers who surrendered and civilian bystanders were considered to benefit from the right to life and the question whether the attackers should have been arrested rather than killed was not raised; Sassoli and Olson 2008, p. 611 and see the discussion of further cases which, it is concluded, give no conclusive answer as to what is expected of government forces using force against fighters; Sassoli and Olson 2008, p. 612. Consider also, for example, William Schabas' objection that human rights law requires that any deprivation of life can only be allowed if it pursues a legitimate purpose and the waging of aggressive war can never be a legitimate purpose; Schabas 2007, p. 612. International humanitarian law is, importantly, blind to the rights and wrongs of the recourse to the use of force that gave rise to the armed conflict, and therein lies its ability to protect all of those caught up in the violence.

10.7.2 Article 5 Tribunals and Prisoners of War

Jelena Pejic comments that Article 5 tribunals "are meant to operate in or near the zone of combat; they only determine status, not criminal or any other responsibility".[20] Cordula Droege supports this approach by explaining that "rights that are exclusively matters of humanitarian law…are those of prisoners of war".[21]

It logically follows from this that what constitutes a competent tribunal for the purposes of Article 5 of Geneva Convention III, the procedures that should be applied by such a tribunal, the criteria against which the status of the individual is determined and the consequences, prisoner of war status or no prisoner of war status, of the decision must also be exclusively determined in accordance with the law of armed conflict. These consequences of combatant status are of continuing vital significance to states. It therefore follows that the internment of prisoners of war should continue to be regulated by law of armed conflict rules as set out in Geneva Convention III and in API.[22]

Moreover, the "detaining state is not obliged to provide review, judicial or other, of the lawfulness of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat".[23] It logically follows from the foregoing that maintenance of PW discipline must also be regulated exclusively by the law of armed conflict.

10.7.3 Matters that Should Be Regulated Jointly by the Law of Armed Conflict and Human Rights Law

It is clear that certain activities associated with armed conflict should be regulated jointly by the law of armed conflict and by human rights law. This does not necessarily mean, however, that both bodies of law will contemporaneously regulate a particular action. Frequently that would not, likely, work. Rather, it usually means that within the same field of activity, certain issues will be for the law of armed conflict to determine while others will have human rights law norms applied to them.

In this sub-section we will address examples of relevant activities showing which body of law would seem to be best suited to the particular circumstances.

It was noted in Sect. 10.7.1 that arrangements associated with the search for, collection, care for and treatment of, respect for and protection of the wounded,

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[20] Pejic 2012, p. 87.

[21] Droege 2007, p. 336.

[22] Pejic 2012, p. 87, where the point is made that "the Third Geneva Convention provides a sufficient legal basis for POW internment and that an additional domestic law basis is not required".

[23] Pejic 2012.

sick and shipwrecked in, or in the vicinity of, combat areas should be matters for the exclusive application of the law of armed conflict. When, however, wounded, sick or shipwrecked persons have been withdrawn to secure places on land and are in a situation analogous to the human rights relationship between an individual citizen and the state, human rights law should be applied exclusively. This will not be the case, however, in relation to wounded and sick persons who, by virtue of Article 14 of Geneva Convention I, and wounded, sick and shipwrecked who by virtue of Article 16 of Geneva Convention II, are prisoners of war. Consistently with what has already been said in relation to prisoners of war, relevant law of armed conflict norms should be applied to such persons to the exclusion of human rights law as noted earlier.

Procurement of weapons and materials of war raises complex legal issues. It is a matter for the domestic law of each state to determine whether legal challenge as to the allocation of national resources, for example to or within defence expenditure, is permitted. As indicated in Sect. 10.7.1, the decisions of commanders as to the deployment and use of the personnel, equipment, stores, ammunition and other resources allocated to them are matters exclusively for the law of armed conflict. Similarly, the lawfulness of weapons that are procured for use in armed conflict and of the methods whereby such weapons are used is exclusively a matter for the law of armed conflict. However, it will be for individual states, and individual human rights treaty regimes, to determine whether challenges based for example on the right to life should be permissible where, for example, the lives of the state's own armed forces personnel or the lives of persons involved in a situation with which security forces are dealing are placed at apparently enhanced risk by virtue of procurement or equipping decisions, for example in respect of protective equipment or weaponry, which appear to have given rise to the circumstance that occasioned the damage or injury.[24]

If persons are detained in the battle-space, we concluded in Sect. 10.7.1 that the law of armed conflict alone applies to their apprehension and to their early detention up to the point where their status as combatants, and thus PWs, or civilians has been determined by an Article 5 tribunal. If, following such determination, it is decided to continue to detain, intern or assign residence to persons who, it has been determined, are civilians, both human rights law and the law of armed conflict should, it seems, apply to them once they have been removed to a location at which the application of human rights law norms is practicable. Similarly, both bodies of law would seem to apply from the moment of apprehension to civilians who, during and in connection with an armed conflict, are apprehended other than in the vicinity of the hostilities and are then interned, detained or assigned residence, for example, aliens in the territory of a party to the conflict.

Cordula Droege explains that "rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman, or degrading

[24] Consider in this regard the case of *Güleç v. Turkey*, Case 54/1997/838/1044, Judgment on 27 July 1998, para 71.

treatment or punishment, the right to life, a number of economic and social rights, and rights of persons deprived of liberty"[25] and this, subject to what has been said earlier in this chapter, must be correct. It should be recalled, however, that the protective provisions of Geneva Convention IV are specific, extensive and important and must also be adhered to. In most circumstances, the two sets of norms will comprise similar requirements and entitlements. Where there is dissimilarity, it is suggested that the norm to be applied is that which will best safeguard the position of the individual who, it must be recalled, is in the hands of an adverse party to the conflict and, thus, in a vulnerable position.

Logically, it would follow from this that during periods of belligerent occupation, the civilian population of the occupied territory should benefit from the provisions of the law of armed conflict that apply specifically in occupied territory (occupation law), including for example Articles 42–56 of the 1907 Hague Regulations and relevant parts of Geneva Convention IV. To the extent that protected persons in occupied territory are also within the jurisdiction of the occupying power for the purposes of human rights law treaties to which the occupying power is subject, human rights and freedoms should be applied for their benefit, where those rights and freedoms do not conflict with specific provisions of occupation law. In the event of any such conflict, and if the conflict cannot easily be reconciled, the better view is probably that the human rights law or occupation law provision that gives greater protection to the protected person should be applied.

Under no circumstances should a criminal trial be allowed to proceed, whether against a prisoner of war or against any other person, in which the fundamental human rights guarantees in Article 75 of API and in the human rights treaties are not assured to the accused. Disciplinary, non-criminal proceedings against a prisoner of war must comply with all of the norms set out in the law of armed conflict, including those in Article 75, and as a matter of best practice, should where feasible be conducted as if the procedural safeguards as set out in the human rights treaties applied.

10.7.4 Matters Exclusively for Human Rights Law

It should be borne in mind that in the present discussion, we are considering where in principle the divide between the law of armed conflict and human rights law should sit. It is for states to decide whether to qualify the application of human rights law provisions by means of derogation. Accordingly, references to the application of human rights law throughout this discussion should be understood as referring to its application subject to such derogation as the applicable treaty may permit and as the particular state may decide to make.

[25] Droege 2007, p. 336.

The law of armed conflict does not regulate or affect the relationship under human rights law during periods of armed conflict of citizens with the authorities of the state to which they belong. Human rights law continues to apply to that relationship. So, for example, civil proceedings involving citizens of the relevant state are regulated by the domestic law rules applicable to such proceedings as supplemented by human rights law, for example the right to a fair trial. Similarly, if for example requisitioning of goods, vehicles, buildings or other items is taking place other than in relatively close connection with the conduct of ongoing or imminent hostilities, and if this is taking place in a location and in circumstances in which it is realistic for human rights law such as that associated with the determination of civil rights to be complied with, then human rights law should indeed be applied to the extent that human rights law is engaged by the relevant decision. If a state considers that such an application of human rights norms is liable to be problematic in foreseeable circumstances of armed conflict, it would be for the state concerned to derogate, to the extent necessary and provided that the applicable human rights regime permits this in the relevant armed conflict circumstances.

As Cordula Droege contends, freedom of expression and right of assembly are typically matters that international human rights law should regulate,[26] although this must be subject to the caveat that particular circumstances might dictate otherwise. If emergency legislation that conflicts with such rights is considered necessary, derogation will be required and should be considered in good time before enacting the legislation.

10.7.5 Non-international Armed Conflict

Section 10.7.1 applies equally to hostilities undertaken in connection with a non-international armed conflict. The treaty law as to the conduct of non-international armed conflict hostilities is markedly less developed than that applying to international armed conflicts. However, customary law as evidenced in Article 8 of the Rome Statute and in the Customary International Humanitarian Law, Volume 1: Rules[27] significantly narrows that gap in provision, such that there is a clear lex specialis of law of non-international armed conflict provision that must be applied. The human rights law norms as to the right to life, for example, are likely to pose the same practicability issues in connection with non-international armed conflict combat as they do with reference to international armed conflict.

Prisoner of war status and thus Article 5 tribunals, Article 14 of Geneva Convention I and Article 16 of Geneva Convention II have no application in relation to non-international armed conflicts. It would therefore seem logical that

[26] Droege 2007, p. 336.

[27] Henckaerts and Doswald-Beck 2005.

once the wounded, sick or shipwrecked are in a situation in which the contemporaneous application to them of law of armed conflict and human rights law norms arises, they should thereafter continue to benefit from the application of both sets of norms to the extent that this is consistent with their new status following recovery.

Belligerent occupation also does not arise in connection with non-international armed conflict. However, the internment of civilians does raise issues under the law of armed conflict, in particular due to the lack of "clear rules on procedural safeguards for internment in non-international armed conflict that would set out State and non-State armed group obligations and be realistically applicable in the varied circumstances in which deprivation of liberty takes place". As Jelena Pejic suggests, development of the law on this matter would be desirable.[28] Such developments are, however, unlikely to result in the near future in non-state actors having human rights law obligations identical or analogous to those of states. Indeed, this imbalance of the obligations of the parties to non-international armed conflicts seems destined to persist for the foreseeable future. As was noted in Chap. 8, however, the Copenhagen Process has produced principles and guidelines as to detention during international military operations in the context of non-international armed conflict, and peace operations. Careful application of law of armed conflict provisions and of the Copenhagen Principles and Guidelines should deal satisfactorily with most foreseeable circumstances. While balanced and realistic treaty provision on these matters would be desirable, states seem unlikely to agree such provision. Soft law, including the Copenhagen text and the ICRC Procedural Principles referred to in Sect. 8.4, is likely to constitute the best arrangements that can realistically be achieved.

10.8 What May Be the Effect of Emerging Approaches to Warfare?

Remote attack techniques of the sort we discussed in Chap. 6 may cause some to question the primacy of the law of armed conflict. This could happen if there is an even greater and more general use of civilians in preparing and conducting hostilities. As we saw in Chap. 7, such a development may for example occur in connection with remotely piloted or autonomous attacks, hostilities in outer space and cyber warfare. If there were to be a radical increase in the use of civilians by western states to undertake hostilities in armed conflict, this might cause some commentators to question the continuing relevance, for example, of the principle of distinction and would potentially lead to the suggestion that a body of law that is not centred on that principle would be better equipped to address the challenges posed by those forms of modern warfare. It will, for this and other reasons, be

[28] Pejic 2012, p. 116.

important for states to ensure that contracting programmes inspired by the wish to achieve economies in the defence budget do not lead to direct participation by civilians in the hostilities.

Similarly, if effects based targeting were to lead to western states repeatedly seeking to achieve particular effects by targeting civilian objects or civilians not directly participating in the hostilities, this might also in time cause some observers to call into question the continuing validity or relevance of the principle of distinction and, by extension, of the body of law of which it is a key element. Attention may then be expected to shift to human rights law and the suggestion is likely to be made that a regime that emphasizes the rights of the individual citizen in his dealings with state authority is better suited to dealing with a conflict environment in which the citizen is being deliberately targeted by organs of a state, not necessarily his own state.

The employment of autonomous machines to fight the battle may also cause some to contend that the delicate balance between military necessity and humanitarian concern is being challenged by the manner in which warfare is being conducted. It is the inherent imbalance in danger between those ordering autonomous or remote missions, who are in no immediate danger whatever, and those who are in the area to be targeted, who may be in very considerable danger, that may cause some to argue that the rights of the potential victims are not adequately safeguarded by the law of armed conflict targeting principles and rules as set out in Articles 48–67 of API. The possible argument would be that such depersonalization of the process of undertaking attacks requires that a higher degree of protection, of the sort reflected in the right to life as discussed in Chap. 9, be given to all persons placed at risk by a particular 'depersonalised' attack. The author does not share the assessments reflected in this section, but foresees that such arguments may be forthcoming as a response to some of these new technologies.

Asymmetric imbalances based on technological superiority of one party to an armed conflict may, in some cases, be diminished by the development by the technologically inferior party of cyber capabilities. Irrespective of whether this occurs, however, the author considers it unlikely that technological asymmetry will have any direct influence on the respective applicability of the law of armed conflict and international human rights law.

10.9 Stagnation in Development of the Treaty Law of Armed Conflict

The discussion in this and the previous chapter makes it clear that stagnation in development of the treaty law of armed conflict seems to be providing an opportunity to those arguing for wider applicability of human rights law in armed conflict by producing the gaps which human rights law is credited with filling. To ensure a more complete law of armed conflict framework, it is now important that work be

undertaken to update and extend the law in areas where gaps exist. If this is not done, the danger is that legal rules that do not pay sufficient regard to the delicate yet all-important balance between military necessity and humanitarian concern are applied more extensively and the result of that would, likely, be a legal regime that combatants in general would find unrealistic and might therefore ignore.

10.10 Is Doing Nothing an Option?

To simply do nothing and allow the status quo to persist would put at risk the legal, as well as the perceived, preeminence of the law of armed conflict. The danger would be that human rights courts and other international tribunals would continue to decide cases on the basis that human rights law applies to an increasing range of activities, including in relation to the conduct of hostilities. Such decisions would be cited and discussed and the risk is that some states will start to adopt a similar line, largely, perhaps, out of ignorance of the foreseeable consequences.

The discussion in this and the previous chapter has also demonstrated the considerable legal complexity that is liable to exist if the 'specific rules in specific circumstances' approach, based as it is on jurisprudence of courts and tribunals, is actually accepted by states as reflecting the law. Core requirements for a body of law governing armed conflict are that it should be clear, that its rules should be well understood by those whose duty it is to comply with it, that it should be reflected in training and that its rules should be accepted as equitable by those whose duty it is to apply them. Some interpretations of the 'specific rules in specific circumstances' principle seem unlikely to match these requirements. The author has sought in this chapter to develop an interpretive framework that would potentially achieve the sort of clarity, predictability, rationality and acceptability that would be required. The discussion in Sect. 10.7 is, however, rather rudimentary. It is only intended to illustrate in relatively brief terms what such an interpretation might involve.

What is now required is that states actively consider the matter, that they collectively determine what principles and methodology they consider should apply to the relationship between the rules set out in these bodies of law and that they then articulate their collective conclusions. The Copenhagen Process is, perhaps, to be regarded as the first step in such a process.

10.11 Conclusion

The primary focus of human rights law is and will remain the interface between the individual citizen and the authorities of the state in whose jurisdiction he is. Broadening that notion of jurisdiction to such a degree that a human rights court has to apply legal rules not expressed in the treaty that constitutes it risks requiring

its judges to apply law with which they may be less than familiar. Some will do so well, some will not and some will decline to make the attempt.

States have brought about the current situation. They adopted treaties that apply two legal regimes to the same categories of circumstance without specifying how that inter-relationship should work. They have not revised and updated the law of armed conflict to take account of developments in the ways war is fought and they have only made somewhat rudimentary treaty provision in relation to non-international armed conflict. Categories of military operations, such as air to air combat, cyber war and war in outer space are not the subject of specific law of armed conflict treaty provision. These important omissions also seem to have contributed to the development of the current situation.

Furthermore, states have as yet failed to use the mechanisms that the law of armed conflict does provide for its enforcement at the state level. This failure to make use, for example, of the International Fact Finding Commission arrangements provided for in Article 90 of API also tends to cause grievances to be pursued through the only operative mechanism that is observably available, namely regional human rights courts. In addition, more extensive use of the compensation arrangements in Article 3 of Hague Convention IV, 1907 and in Article 91 of API would also be helpful in this regard.

However, of greater significance are the simple facts that the relationship between the two bodies of law is not always clear and that there is little evidence of a determination at state level to address that matter or its root causes. The consequence at the operational and tactical levels is that it may, it seems, be difficult to know in advance of undertaking certain military tasks which body of law will apply to them. This is unacceptable because armed forces personnel must always be thoroughly aware in advance of what prohibitions and restrictions constrain their choices.

So logic, rigour and clarity must be brought to bear in this aspect of the law and an international process must be triggered to achieve that. With considerable hesitation, the author has proposed a possible framework in this chapter. It by no means constitutes a 'blueprint' for a way ahead, not least because it lacks sufficient breadth and detail. Only when a more granular and extensive approach has been developed, in which the full range of activities associated with armed conflict is considered and categorized, will it be possible to finally determine whether a methodology such as has been suggested has merit. This might, in the first instance, be a useful task for a carefully selected panel of experts.[29]

The purpose would of course be to seek to seek to achieve a consensus as to the practical implications of the contemporaneous applicability of international humanitarian law and human rights law. Such expert work could then inform inter-state discussion of the matters addressed in this chapter.

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[29] Perhaps Francoise Hampson is right that what is needed is a meeting of "members of the ICJ and of human rights treaty bodies, representatives of states with relevant experience and independent experts to provide solutions to the problems identified"; Hampson 2008, p. 572.

More specifically in relation to non-international armed conflict, is it right to use human rights law to fill the gaps that are the unavoidable consequence of the lack of combatant status? There are those who would argue that it would be better if such gaps were to be filled by applying by analogy the procedural, treatment and other rules of the law of armed conflict that would apply to combatants so far as is consistent with the lack of combatant status of the individuals concerned. States might agree such an arrangement or they could simply adopt such a practice which would involve some comprehensive safeguards for the individuals involved.

Marco Sassoli discusses the suggestion, when deciding between the application of an international humanitarian law rule and a human rights law rule in a particular circumstance, that the rule to be applied must be that which provides the greatest protection. He explains that this approach "neglects the fact that IHL is a compromise between the elementary considerations of humanity—thus, the protection of the individual—and military necessity. As such it is preferable to apply the more detailed rule, that is, that which is more precise vis-à-vis the situation and the problem to be addressed (not forgetting that some protection provided by human rights law may disappear due to derogations, in which case the protection provided by IHL may again be more precise)".[30]

It is frequently unclear when armed forces personnel, in a situation of armed conflict, are or should be exercising police powers. Marco Sassoli concludes that "[t]he limited body of case-law is thus not conclusive on the question as to what [international human rights law] requires from government authorities using force against fighters" and that therefore both international humanitarian law and international human rights law are ambiguous on the matter. He suggests that "some situations contain more specificities of the situation for which the IHL rule was made and some situations more facts for which IHRL were typically made". He therefore deduces from this that "[w]hile the answer must be flexible, it is necessary to determine factors which make either the IHL of international armed conflicts rule or the IHRL rule prevail". He suggests that the extent of governmental control would tend to point to the application of human rights law norms.

Acknowledging that some will regard the nuanced approach that he has proposed as unable to provide solutions, Marco Sassoli suggests that the complex and controversial rules that those involved in such military operations will need to apply will require the best possible training and instruction; meetings of lawyers and practitioners to operationalize the interplay of the rules; and the involvement of armed group representatives in such processes.[31]

If the proposals put forward in the main part of this chapter are not achievable, a process along the lines of that put forward by Marco Sassoli will probably be required. The author, however, regards such an outcome as unsatisfactory, partly because of the acknowledged complexity of the applicable rules and partly because of the considerable practical difficulty that will confront commanders in

[30] Sassoli 2011, p. 70.

[31] Sassoli 2011, pp. 78–94.

determining in advance of military action which set of rules is to be applied. Training is, in the author's view and experience, no substitute for clarity in the rules that are to be trained and applied. Indeed, training is the method whereby the clear understanding of the trainer becomes the clear understanding of the trainee. The ambiguities referred to by Marco Sassoli will, in practice, persist after training is completed and the resulting confusion is unlikely to be conducive to respect for, or compliance with, the law. The rules as to the targeting and detention of fighters are central to the conduct of the most numerous kind of contemporary armed conflicts. It is of vital importance that we achieve clarity as to the body of law that is to be applied and as to what that body of law prescribes.

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Chapter 11
War in the Spotlight

Contents

11.1 Introduction

The title of this chapter is phrased in deliberately loose terms to reflect what is intended to be a broad discussion of the numerous ways in which what is taking place on the battlefield can influence domestic opinion at various levels and vice versa. The development that has taken place in mass media and personal communications technology in all its forms during the last century and a half has been so dramatic as to amount to a revolution.

Within the lifetime of this author, the journey from London to Sydney has been shortened from 4.5 weeks by sea to 21 h by airliner. Paper communications by postal service, with the attendant delays, have been largely replaced by instant

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_11,

global communication by Email. From battle reports being printed in the national newspapers days or even longer after the event in the mid-nineteenth century, we have progressed to virtually instant coverage by television of happenings occurring on the other side of the world, frequently including 'live' digital film images of the unfolding event. This digital revolution coupled with 24 h news television has put the media and its coverage at the centre of internal security situations and of armed conflicts, and the speedy way in which 'breaking news' is transmitted directly into the living rooms of the domestic population[1] requires the most alert and rapid reaction cycle from commanders and indeed from personnel on the ground in the theatre of operations.

The days when commanders can dictate or control the media message are long gone, save in the most exceptional circumstances where remoteness of the battle area or some similar consideration renders media presence impractical. In many conflicts of today, the 'strategic corporal'[2] is an ever-present reality and the activities of personnel of the most junior rank can also have virtually instant strategic impact.

Arguably even more dramatic has been the development in personal voice and image communication. Every person with a suitably equipped mobile phone becomes a potential reporter, cameraman, sound technician and commentator all rolled into one. The images, sounds and impressions of events and their consequences can be communicated instantly via global mass media organizations such as the BBC and CNN. Those mass media networks may receive numerous such recordings of the same incident. Their choice as to which images to broadcast, how to structure the report and what comment to include are bound to influence the impression and understanding of the vast numbers of viewers who observe their programmes. How do they make these choices, and with what purpose?

Technological development means that it is possible for such outlets as the BBC and CNN to broadcast with astonishing speed a report of an incident, combined with contemporaneous footage of what took place and recorded interviews of witnesses all supplemented by commentator's comment. Within a very short time of an incident occurring, powerful data[3] is in the public domain on which the casual observer will frequently feel able to base a view as to the rights

[1] Daniel Thürer comments that "violence on the international level attracts the media who, one might say, present it as entertainment for vast, passive audiences. It is as if war had become a spectacle, designed to amuse the solitary television viewer"; Thürer 2011, p. 33; but as to the importance of the media in contemporary conflicts see Thürer 2011, pp. 352–356 and consider *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, ICTR*, Trial Chamber Judgment 3 December 2003, Case Number ICTR-99-52-T, para 99 (the *Radio Télévision Libre des Mille Collines* case).

[2] This is a reference to the capacity of relatively junior-ranking individuals in armed conflict or other sensitive situations to have strategic effect by virtue of what they do or say.

[3] Recall, for example, the enduring power of the image of Kim Phuc, the Vietnamese girl photographed in 1972 as she fled naked from her village following a napalm attack in which her body had been scorched.

and wrongs of what took place.[4] By contrast, before his encounter with media correspondents, the press spokesman for the relevant party to the armed conflict may perhaps receive an unhelpfully brief report from a deployed combat headquarters; the prime focus of that headquarters is, quite properly, likely to be on fighting the ongoing battle. Media personnel listening to the spokesman's announcement may well know far more about what took place than he does at that time. More significantly, however, the media personnel attending the press conference are liable to be seeking answers to questions that are based on the information that may well be unavailable to the spokesman. Indeed, such answers may only be available after detailed, time-consuming investigation. To guess in advance of such investigation carries the risk that inaccurate information will be given to the media. Accuracy in all information supplied to the media is critical to the continuing credibility of the spokesman and of his department. It takes, one might suggest, a very rare kind of individual to put in a convincing performance confronted with such a significant 'information deficit'.

Giving the honest answer, 'I do not yet know—the matter will need to be investigated' may only instil confidence among the domestic population if presented sympathetically by the reporting media. Their willingness to do so may be influenced by earlier events and by national or political affiliation. While the media representatives of the state whose armed forces were involved may, but will not necessarily, be sympathetic, foreign media may choose to draw adverse inferences and international perceptions of an event that may attract global attention may vitally and adversely affect public support for the war.

The media battle space has become of vital importance in current and future conflicts. International law constraints on media reporting are very few, but will be considered briefly below. It is, however, important to consider the media dimension to conflict in a book of this nature as it is of clear relevance to the changing nature of warfare, the new ways of conducting it, the civilianization of the battle space and the growing importance of human rights in armed conflict.

Accordingly, we will consider what little the law has to say about the status and roles of war correspondents and journalists, reflecting in particular on the limited international law constraints on media reporting of armed conflict. In doing this we will note the importance of public acceptance of the conflict and of the manner of its prosecution, will try to differentiate between factual broadcasting or reporting on the one hand and propaganda operations on the other, asking whether the latter activity does, or should, render the involved individuals and the equipment and buildings they use for that purpose lawful targets.

In the next section, we consider the diverse forms of media that now exist, ranging from public broadcasting to private communication in its different forms, including the use of mobile hand held devices. We will ponder whether it is

[4] Consider, for example, the observation by Wesley Clark that public opinion, through restrictive rules of engagement, was "doing to us what the Serb air defense system had failed to do: limit our strikes"; Clark 2001, p. 444.

legitimate for the state in situations short of armed conflict to restrict these forms of media communication, whether limits are placed on media operations by states involved in armed conflicts and whether cyber communications in and out of a state can lawfully be stopped, interfered with or restricted.

The images, footage, sound recordings, contemporaneous reports and other similar material frequently depicts events associated with internal security situations and with armed conflicts that amount to breaches of the relevant criminal law or war crimes. We will ask what the strategic implications of this are in the context of universal jurisdiction for prosecution of war crimes, and what considerations should determine the admissibility of such evidence in criminal proceedings.

In Sect. 11.6, we look at new ways and methods of conducting warfare, reflecting on whether they are likely to affect the activities of the media and the way the parties to the conflict will respond to media activities. We ask what effect civilian involvement in the battle space should have on media activity, and we assess whether media coverage of armed conflict is shaping the public attitude to the applicability of human rights law norms. We consider the media and public perception implications of the kind of cyber deception operations we discussed in Chap. 4. Then we look at another aspect of the 'spotlight' referred to in the chapter's title by looking at the circumstances in which the law itself becomes part of that spotlight. So, we will look at coroners' courts and other inquiries, criminal courts, judicial review, human rights proceedings, challenges at the political level, international courts and tribunals. We will seek to summarize that part of the discussion by reference to the notion of lawfare as it may be interpreted in the modern age. Then in Sect. 11.11, we will seek to draw some conclusions.

11.2 War Correspondents and Journalists

The law of armed conflict has traditionally drawn a distinction between war correspondents accredited to a force and journalists on dangerous professional missions.

Taking war correspondents first, their special status in the law derives from the specific mention of them in Article 4A(4) of Geneva Convention III. Here reference is made to "Persons who accompany the armed forces without actually being members thereof, such as […] war correspondents […] provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model."[5] The most significant consequence therefore of being classified as a war correspondent is the right to prisoner of war status on capture. The two conditions

[5] The precursor to this provision was Hague Regulations, 1907, Article 13 which refers to "individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters" being entitled to prisoner of war treatment provided they are in possession of a certificate issued by the force they accompanied. It is immediately evident that the 1907 absolute requirement as a condition for prisoner of war treatment that the prisoner have the certificate with him on capture is replaced by the two requirements referred to in the main text.

that must be complied with in order to gain that right are, first, that the individual must have received authorization from the armed forces and secondly that he must have been issued with an identity card disclosing his status. Unlike the position under the Hague Regulations, there is no explicit requirement that the individual actually have the card with him at the time of capture.

The Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API 1977) contains particular provision in relation to what are described as 'journalists on dangerous professional missions'. The degree of protection that they receive is the same as that accorded to civilians.[6] The conditions applying to their protected status are important, namely: "They shall be protected as [civilians] under the Conventions and th[e] Protocol, provided that they take no action adversely affecting their status as civilians,[7] and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention."[8] In order to enhance the effectiveness of this protection, API notes that journalists engaged in dangerous professional missions" may obtain an identity card similar in form to a model given in Annex 2 to API. Such a card must be issued by the government of the journalist's state of nationality or of residence or by the government of the state where the news medium employing him is located. The card must attest to the holder's status as a journalist.[9]

Protection as civilians means that journalists must not be made the object of attack provided that they are not directly participating in hostilities. It means that those taking the precautions required by Articles 57 and 58 must also take journalists into account in the same way as other civilians. Therefore, they count in the discrimination, and thus in the proportionality rules and should, where the circumstances permit and Article 57 requires it, be among those who are warned of attacks. War correspondents, however, although they are listed under Article 4A, nevertheless have the status of civilians and thus have the same legal protection from attack as journalists and other civilians.[10] In the following discussion, we will therefore use the generic term 'journalist' to refer to war correspondents, journalists, reporters, cameramen, sound recordists and media technicians.

It is in the nature of journalistic activity to seek to acquire newsworthy information, which will tend to be information that is not generally known. This will

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[6] API, Article 79(1). As the API Commentary notes, journalists exercising their profession in situations of armed conflict often encounter risks similar to those faced by members of the armed forces; Sandoz et al. 1987, para 3245.

[7] Action adversely affecting their protection as civilians would include direct participation in the hostilities as referred to in API, Article 51(3).

[8] API, Article 79(2). Article 4A(4) of the Third Convention provides for accredited war correspondents to have prisoner of war status on capture by an adverse party.

[9] API, Article 79(3) and see generally Dinstein 2010, pp. 166–168.

[10] Hans-Peter Gasser and Knut Dörmann point out that war correspondents may carry out the normal activities that form part of their occupation in the area of operations, including looking around, taking notes, making visual and audio recordings; Gasser and Dörmann 2013, p. 251.

then be passed to other persons involved in the processing of news, with a view to it eventually being broadcast, printed or otherwise communicated to the media audience. If, while a journalist is in territory controlled by one of the parties to the conflict and by acting clandestinely[11] or on false pretences, he obtains or seeks to obtain information with the intention of passing it to the hostile party to the conflict, he commits espionage as that term is understood in the law of armed conflict.[12] Journalists should therefore be cautious about where and how they obtain information and over what they do with it. When obtaining information they should always make it clear who they are, that they are journalists, that the information they seek is intended for publication in whatever form and that the process of publication will necessarily afford the adverse party to the conflict access to the relevant information. It is important to note that international law does not prohibit espionage[13] but spies may be prosecuted under the domestic law of the party to the conflict affected by their activities.[14]

There are very few restrictions placed by international law on what journalists may report.[15] There is, for example, the obligation to protect prisoners of war against insults and public curiosity,[16] an obligation which would be breached if media

[11] Clandestine operations are those conducted in such a way as to ensure secrecy or concealment; AMW Manual 2009, commentary accompanying Rule 118, para 1.

[12] Hague Regulations, 1907, Article 29.

[13] AMW Manual 2009, Rule 119.

[14] AMW Manual 2009, commentary accompanying Rule 119, para 3.

[15] Note, for example, the Occupying Power may not engage in propaganda to secure voluntary enlistment of protected persons in the armed forces or auxiliary forces of the occupying power; Geneva Convention IV, Article 51(1) and UK Manual 2004, para 5.15.1.

[16] Geneva Convention III, Article 13(2) and consider Article 129, which requires states party to suppress all acts contrary to the Convention's provisions. Consider the broadcast during the Iraq War of images of prisoners; in 2005 the transmission of images of Saddam Hussein while in US custody; in 2012, the interview on television of a pilot shot down during the Syria Conflict; and in December 2012 a broadcast showing the parading of male prisoners in connection with the Syria Conflict. A Memorandum dated 26 November 2007 under the title "'Public Curiosity' in the 1949 Geneva Conventions: The Interpretation Developed by the Government of the United Kingdom of Great Britain and Northern Ireland and the British Red Cross" proposes that the following principles should be applied: "(1) Any image of Prisoners of War (POWs) as identifiable individuals should normally be regarded as subjecting such individuals to public curiosity and should not be transmitted, published or broadcast. Where the specific circumstances of a case make it necessary in the public interest to reveal the identity of a POW (e.g. because of the person's seniority, or because the person is a fugitive from international justice) great care should be taken to protect the person's human dignity. (2) Images of POWs individually or in groups in circumstances which undermine their public dignity should not normally be transmitted, published or broadcast. In the exceptional circumstances where such images are transmitted, for example, to bring to public attention serious violations of international humanitarian law, individual identities must be protected". The Memorandum goes on to express the hope "that media organisations and individual journalists would act prudently and discreetly when reporting on prisoners of war, bearing in mind the effect of publication or transmission of their work on the prisoners of war and their families". The Memorandum is available at http://collections.europarchive.org/tna/20080205132101/, http://fco.gov.uk/files/kfile/red%20cross%201.htm.

broadcasts or reports identify particular prisoners and include any material that would properly be regarded as either insulting them, given their situation and status, or as provoking public interest in them or indeed as exposing them to enhanced risk of oppressive treatment by their captors.[17] However, as regards the conduct of the hostilities, international law imposes no real restrictions or prohibitions.

There is a self-evident importance in a democratic society of public acceptance of an armed conflict and of the manner in which it is being conducted by the state's armed forces. If the public appreciation as to the conduct of the war is inevitably heavily influenced, more likely formed, by the reporting of it, by mass media organizations, the distinction between factual reporting and editorial comment becomes vital. Not all media will operate entirely independently from the government of a state. It is particularly important for journalists to know which activities will render them, their colleagues and equipment lawful objects of attack by an adverse party to the conflict. There is, however, no international law prohibition of propaganda, information operations or indeed of psychological operations.[18] However, civilians who are involved in facilitating combat communications are likely to be directly participating in the associated hostilities. If, for example, journalists were to become involved in the transmission of orders relating to hostilities to armed forces personnel, or if they were to incite the attack of specific objectives by a party to the conflict, or if they were to become involved in the military communications network, or if they were to undertake espionage this would be likely to render them while so engaged and the equipment, facilities, buildings and other objects they use for such purposes as lawful targets of attack.[19]

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[17] A distinction must be drawn between journalists interviewing prisoners in order to disclose the unlawful treatment to which they are being exposed with a view to improving their situation, and journalists questioning prisoners in such a way as to expose them to the risk of oppressive treatment. Consider, in relation to the civil war in Syria, criticisms of the questioning of prisoners by BBC and al-Jazeera journalists; Saxon 2013, available at www.cpj.org/security/2013/01/humanitarian-law-ethics-and-journalism-in-syria.php.

[18] Tallinn Manual 2013, commentary accompanying Rule 11, para 9h.

[19] See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, International Criminal Tribunal for the Former Yugoslavia (ICTY) (2000) at paras 75 and 76. Tony Rogers discusses the attack on the Belgrade television station on 23 April 1999, the attack on the Baghdad television station in March 2003 and the attack on the Basra radio and television station the following day, and concludes that attacks on media stations may be permissible, subject to the rule of proportionality, if the station helps the enemy in its military operations, "for example if it is integrated into the military communications system, possibly if it is used to incite violence, but not if it merely broadcasts news, even of doubtful validity, to the population"; Rogers 2012, pp. 121–122. See also Daniel Thürer's discussion of the attack on the Belgrade Broadcasting Station; Thürer 2011, pp. 80–81. At pp. 81–82, Daniel Thürer seems to be implying that attacking a sleeping soldier during an armed conflict is rendered unlawful by the customary principle of proportionality and/or modern human rights and constitutional law. If that is the intended inference, it is not accurate. During an armed conflict, it is lawful to attack combatants or fighters of the opposing party unless they are *hors de combat* or for some reason specially protected from attack.

Propaganda and factual reporting will not, however, cause a journalist to lose his protected status of civilian.[20]

11.3 The Diverse Media and Attempts to Control it

The media revolution has been characterized, as we noted in the Introduction, by rapid increases in both the speed of communication and in the diversity of types of system that are employed. The virtually instantaneous nature of mass media transmission and reception of news reports from virtually anywhere in the world has led to the notion of a 'global village', enhancing feelings of global interdependence and reinforcing the perception that events that might in earlier times have been regarded as less than relevant to inhabitants of a distant location are now seen as potentially affecting the wider global community or at least more elements of it. One international law implication of this is that acts may be perceived as threats at a greater physical distance from the act and thus by a larger number of States.[21]

The exponential proliferation of mobile phone-related technology has produced a novel global medium through which, in conjunction with the Internet, private individuals, for example, can communicate video images of conflict-related incidents as they happen. Those images can be made accessible online by anyone with Internet access and can be used by mass media organizations in connection with news broadcasts. At a slightly lower level of technical sophistication, eye-witness accounts can be communicated by telephone, by Skype, Face-time or other video-linked methods or by email. The common feature is the ability of private individuals to place their eye-witness accounts in the hands of mass media organizations virtually immediately. This has empowered individual civilians, groups of civilians and even whole populations "in ways unthinkable a

[20] This assumes, of course, that the journalist is in fact a civilian. If he is both a journalist and a combatant, he can be lawfully attacked at any time during the armed conflict. Note Resolution 2 of the 31st International Conference of the Red Cross and Red Crescent, dated 1 December 2011, available at www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-2-2011.htm. Objective 3 of Resolution 2 is entitled "Enhanced protection of Journalists and the role of the media with regard to international humanitarian law" and recognizes, among other things, that the work of journalists and other media professionals may make an important contribution to public knowledge of and recording of information on violations of international humanitarian law. The Objective notes that journalists assist in preventing violations as well as countering impunity.

[21] Consider the prohibition of the threat or use of force in Article 2(4) of the UN Charter. The combined effect of remote attack techniques such as are discussed in Chap. 6 and the widespread and instantaneous dissemination of information as to what is occurring means that more widespread communities may be regarded as affected by a threat than would have been the case in earlier times.

half-century ago".[22] As Charles Dunlap noted, today even autocrats ignore the morale of the people at their peril.[23]

Mass media and privately owned mobile communications devices can be used by parties to the conflict to substantiate claims that the opposing party has breached the law of armed conflict and/or human rights law. Perhaps more importantly, such media can be used, indeed is already being used, as the glue that binds the otherwise disparate elements of a group together. They become the medium through which they plan and organize their military operations, perhaps the method and means that they employ when undertaking certain kinds of attack and the forum in which they distribute information as to their aims, their activities and their strategic purpose with a view to persuading the huge audiences that social media can generate as to the worthiness of their cause. Eric Jensen suggests that social media will erode national affiliation and will cause people to see themselves more as members of global ideologies created, maintained and mobilized through those media.[24]

The use of law to further the interests of parties to the conflict, or of interest groups opposed to the conflict, is becoming ever easier as these new technologies make more information available, information which will not necessarily tell the full story of an event and which may be capable of manipulation or distortion.

States involved in armed conflicts or in internal security situations short of armed conflict may have an interest in seeking to control the amount or nature of information that is made publicly available. Operational security, as it is called, may be a priority in order to keep the numbers, deployment, intentions, capabilities, available weapon systems, state of readiness, logistic support arrangements and other circumstances of their forces secret. Knowledge of such matters by the opposing party to the conflict may give that party an advantage in battle. Furthermore, governments confronted by unrest, internal security situations and indeed by a non-international armed conflict will have an interest in seeking to disrupt the communications systems used by those who oppose them. In a number of conflicts that, taken together, have come to be known as the 'Arab Spring', mobile phone technology and the Internet have been used not only to report events, in the manner discussed earlier in this chapter, but also to coordinate activity among individuals and groups taking part in the civil unrest.[25] Disrupting that coordination is an understandable objective of government security forces. So in the next few paragraphs we will consider what action can lawfully be taken in respect of mass media and of individual communications technologies in order to

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[22] Dunlap 2006, pp. 121–122.

[23] Dunlap 2006, p. 122; "In today's information-intensive world, events can radically and rapidly impact civilian attitudes in ways that instantly impact ongoing military operations"; Dunlap 2006, p. 123.

[24] Jensen 2013, pp. 17–18. "These Groups will use social networks to recruit, gather resources, provide financial support, collect and pass intelligence, and create and transmit plans of action including attacks"; Jensen 2013, p. 18.

[25] See footnotes 27–30 below.

seek to maintain such operational security and/or to disrupt the communications systems being used by an opposing party to an armed conflict or by those involved in civil unrest.

Where war correspondents are concerned, the force to which the correspondent is accredited would likely brief its correspondents as to the matters that are sensitive and that should not therefore be reported, unless this is self-evident. If the correspondent nevertheless discloses sensitive material, the ultimate sanction for the Force Commander would be to consider revoking the war correspondent's authorization and to withdraw his identity card.[26] However, dialogue, perhaps through the Political Adviser in the Headquarters, would be the normal way of ensuring appropriate reporting.

Exercising sophisticated control of modern private communications systems may be tempting but may not be technically or legally quite so straightforward. From the feasibility perspective, consider, for example, recent events in Egypt,[27] Tunisia,[28] Syria[29] and Libya.[30] It is also worthy of note that, during the 2012 riots in London and other cities, the UK government reportedly considered shutting down the Internet, but was dissuaded from doing so.[31]

During internal security situations short of armed conflict, the domestic law of the relevant State, as supplemented by relevant international treaties to which the state is party[32] and human rights law, will determine what action a state can

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[26] This would be appropriate, for example, if the access that his status as an accredited war correspondent gives him to the relevant force is being misused. A journalist whose accreditation has been removed would nevertheless be protected under Article 79 of API but would no longer be entitled to PW status on capture.

[27] In 2011, Internet traffic to and from Egypt was virtually entirely cut off. Reportedly, mobile phone operators in Egypt were instructed by the then government to suspend services in selected areas and felt obliged to comply; Richtel 2012, available at www.nytimes.com/2011/01/29/technology/internet/29cutoff.html?_r=0.

[28] Reportedly, Tunisian suppression of online activity included bloggers and others in Tunisia being arrested and attacked for their online activities; stolen usernames and passwords were used to close down Email accounts but the regime did not close down the Internet entirely; see O'Brien 2011, available at www.cpj.org/internet/2011/01/will-tunisias-internet-revolution-endure.php.

[29] See Barnard and Mackey 2012, available at http://thelede.blogs.nytimes.com/2012/11/29/internet-outage-reported-across-syria/, and Whittaker 2012, available at www.zdnet.com/syria-suffers-internet-blackout-cut-off-from-the-outside-world-7000008100/.

[30] Sutter 2011, available at http://edition.cnn.com/2011/TECH/web/02/22/libya.internet/index.html.

[31] Williams 2011, available at www.telegraph.co.uk/technology/news/8862335/Cameron-told-not-to-shut-down-internet.html.

[32] Note that under Article 35 of the Constitution of the International Telecommunication Union as amended by the 2010 Plenipotentiary Conference, "Each member state reserves the right to suspend the international telecommunication service, either generally or only for certain relations, and/or for certain kinds of correspondence, outgoing, incoming, or in transit, provided that it immediately notifies such action to each of the other member states through the Secretary-General." See also Article 7 of the International Telecommunication Regulations, Dubai, 2012 as to notification of such action to the Secretary General.

legitimately take to interfere with cyber communications and telecommunications activity. The Regulation of Investigatory Powers Act 2000[33] governs the covert surveillance of private communications in the UK. Under section 71 of the Act, the Covert Surveillance and Property Interference Code of Practice is issued by the UK Home Office.[34] Furthermore, and to the extent discussed in Chaps. 9 and 10, Human Rights law will also apply to any operations to suspend, control, restrict or conduct surveillance of private communications, including telecommunications and communications using the Internet.

11.4 Human Rights Law and Interference with Private Communications and with Journalism

So far as is relevant to the current discussion, Article 10 of the European Convention provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers….
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, […] for preventing the disclosure of information received in confidence, […]

The right has been interpreted as imposing a positive obligation on the state to protect freedom of expression and to prevent encroachments on it[35] but where the relevant comments "constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression".[36] The European Court has "repeatedly emphasized that Article 10 safeguards not only the substance and contents of information and ideas, but also the means of transmitting it".[37] Accordingly, "prior restraints on the press…must not provide a subterfuge for repressive measures against anti-governmental

[33] 2000 c. 23. The Act addresses, so far as is relevant, interception of communications, the acquisition and disclosure of data relating to communications, surveillance, the acquisition of means whereby the electronic data protected by encryption or passwords may be decrypted or accessed and associated matters including in relation to the security services.

[34] The Code was issued in 2010 and is available at www.homeoffice.gov.uk/publications/counter-terrorism/ripa-forms/code-of-practice-covert?view=Binary. The Code provides guidance to public authorities on the use of covert surveillance likely to result in the obtaining of private information about individuals.

[35] See for example *Özgür Gündem v. Turkey* 2000-III; 31 EHRR 1082, paras 41–46.

[36] *Surek v. Turkey* (No. 1) 1999-IV, GC at para 61.

[37] Harris et al. 2009, p. 465.

media". As such restraints constitute the most serious threat to free flow of information and to public debate, tests of proportionality, 'prescribed by law' and 'legitimate aims' may be stringently applied.[38]

These authorities make it clear that wholesale interferences with freedom of expression are not likely to be tolerated by the courts. Proportionate, targeted action that is provided for in the domestic law and that has the specific aim of preventing incitement to violence would seem to be in accordance with the Court's jurisprudence. Clearly, measures that are repressive in nature and that have the appearance of simply preventing anti-government elements expressing their views publicly are highly likely to constitute a breach of the right and thus to be unlawful. Telephone, mobile phone, letter, Email and other Internet-based communications all seem to be covered by the right. While Article 10 rights also safeguard the means of transmission of the communications, it is clear that a decision, say, to suspend Internet access would be considered by reference to the notions of proportionality, 'prescribed by law' and 'legitimate aims' referred to in the previous paragraph.

For interference with expression to be justified in prevention of disorder, terrorism or other crime, there must be adequate safeguards against the danger of abuse.[39] However,

> when confronted with real or potential danger of terrorism, contracting parties are […] fully entitled to take appropriate measures under Article 10(2), including a ban on broadcasting images or voices of proscribed organizations. Such measures are necessary to deny terrorist or other prohibited organizations unimpeded access to the broadcasting media, and to prevent them encouraging or inciting to violence, or giving an impression of legitimacy through the powerful audiovisual means.[40]

In this regard, it should be borne in mind that

> [i]nformation technologies such as the Internet, mobile phones, instant messaging, and even Twitter have extended the global reach of many groups. These tools have led to enhanced efficiency in many terrorist-related activities, including administrative tasks, coordination of operations, recruitment of potential members, communication among adherents, and the attraction of sympathizers. In recruitment and fundraising, for example, the Internet has become a vital tool for perpetuating terrorist groups, both openly and clandestinely.[41]

The reference in the European Convention to everyone's right to respect for his correspondence[42] is of greatest relevance to measures states may wish to take to conduct surveillance of private communications. Proposals to intercept email

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[38] Harris et al. 2009, p. 465.

[39] *Ekin v. France*, 2001-VIII; 35 EHRR 1207, para 48.

[40] Harris et al 2009, p. 476 where the cases of *Purcell v. Ireland*, 15404/89, 70 DR 262 (1991), and *Brind v. UK*, 18714/91, 77-A DR 42 (1994) are cited.

[41] Cronin 2011, p. 140–141.

[42] European Convention, Article 8(1).

correspondence[43] and telephone communications[44] must be considered in the light of Article 8(1) rights to private life and to correspondence, but disclosure of a communication by its addressee does not breach the requirement for 'respect' for correspondence.[45] Interference with the right is, as we saw in Chap. 9, only legitimate if undertaken in accordance with the law and necessary on one of the grounds listed in the Article.[46]

In Chap. 9, we examined the relationship between human rights law and the law of armed conflict, noting the 'specific rules in specific circumstances' basis for deciding when law of armed conflict norms are considered in determining whether a particular human right has been breached during, and in connection with, an armed conflict. Given that criticisms of the approach were expressed in Chaps. 9 and 10, it is nevertheless worth considering how it would apply during armed conflict in the circumstances discussed in this section.

Adopting the 'specific rules in specific circumstances' approach to the freedom of expression as set out in Article 10 of the European Convention, one is led to the conclusion that this is an activity to which both law of armed conflict and human rights law norms should be applied, depending on the particular circumstances. In Chap. 10, we discussed how 'specific rules in specific circumstances' might sensibly be applied, concluding that the critical factor to consider is the degree of connectedness between the circumstances alleged to constitute a breach of human rights and the conduct of hostilities. So let us apply that reasoning to journalistic reporting in times of armed conflict. The more that that activity has in common with normal peacetime situations to which human rights law norms routinely apply and the looser its connection with the actual fighting, the stronger is the case for applying human rights law norms. That interpretation is, if anything, strengthened if the human rights rule includes provision specifically applicable in the relevant armed conflict circumstances. This may sometimes be satisfied by the Article 10(2) reference to restrictions in the interests of national security, territorial integrity and public safety and for the prevention of disorder. Much will depend on whether, in times of armed conflict, those restrictions are so interpreted, e.g. by human rights courts, that states are able adequately to safeguard their security, both by reference to the immediate conduct of the hostilities and more generally. There ought to be a margin of appreciation here. It should, however, be legitimate for a Commander to withdraw accreditation from a war correspondent who fails to comply with previously explained reporting restrictions thereby imperilling the force. In general, during international and non-international armed conflicts any

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[43] *Copland v. UK*, Application No. 62617/00, ECtHR Judgment dated 3 April 2007, para 41, deciding that Emails sent from work and information derived from the monitoring of personal Internet usage should be protected under Article 8, ECHR.

[44] *Klass v. Federal Republic of Germany*, A 28 (1978); 2 EHRR 214, para 41 PC.

[45] *AD v. Netherlands*, 21962/93, 76A DR 157 (1994).

[46] These include that the interference must be necessary in a democratic society in the interests of national security, public safety or for the prevention of disorder or crime; European Convention, Article 8(2).

emergency legislation restricting journalists' freedom must come within the formalities, conditions and restrictions mentioned in Article 10(2). Necessity will be the prime issue. The state may only restrict freedom of expression to the extent necessary for the purposes we have been discussing. That, therefore, is the limitation with which relevant emergency domestic legislation must be constrained.

Where restriction of the right to private communication is concerned and in light of the criteria recalled in the previous paragraph, it would be sensible to apply law of armed conflict norms where the disclosure, for example, will have a direct effect on armed conflict combat or on the wider conduct of the war. As an illustration, Article 25(3) of Geneva Convention IV recognizes that parties to the conflict may deem it necessary to restrict the Article 25(1) right of family correspondence of persons in that party's territory or in territory occupied by it.[47] The ICRC Commentary refers to pressure of circumstances and technical considerations obliging belligerents to limit the number of letters and cards that each person is entitled to send and receive. In a more modern context, military considerations may limit the bandwidth available for Email traffic to and from the relevant members of the population and may therefore necessitate similar restrictions.

A further example is to be found in Article 27 of Geneva Convention IV which permits parties to the conflict to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war".[48] The ICRC Commentary asserts that even where measures of constraint are justified, they must not affect the fundamental rights of the persons concerned.[49]

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[47] See also Tallinn Manual, commentary accompanying Rule 87, para 3.

[48] Geneva Convention IV, Article 27(4).

[49] Pictet 1958, p. 207. Pictet regarded these supreme rights as being endangered by assigned residence or internment but not, generally speaking, by, e.g. periodic reporting to police authorities, carrying an identity card or a ban on carrying arms. The Tallinn Manual finds a Rule that the "Occupying Power may take measures necessary to ensure its general security, including the integrity and reliability of its own cyber systems"; Tallinn Manual, Rule 89. The Manual cites as examples of steps that might be taken in accordance with this rule shutting down communications systems used to transmit information about the Occupying Power to insurgent forces; prohibiting email references to military movements, posture, weapons, capabilities, or activities; implementing militarily necessary restrictions on the use of certain servers; imposing time restrictions on use of the Internet when military authorities need bandwidth; or placing restrictions on use of the Internet by individuals that pose a security threat; Tallinn Manual, commentary accompanying Rule 89, para 3. In applying the law of armed conflict's norms, these are the kinds of step that will in practice be applied when necessary by states in occupied territory. Such steps are relevant to the threats and security concerns the Occupying Power may expect to face and it is the fact that such measures are relevant, practicable and yet limited to that which is necessary in the circumstances that demonstrates that the law of armed conflict norms will apply to the stated circumstances.

11.5 The Strategic Impact of News Media and Private Communications Reporting

Video imagery, still photographs, sound recordings, eye-witness accounts to camera, commentary from correspondents and other transmitted material can disclose newsworthy events relating to situations that may lie anywhere on the legal spectrum of conflict that we discussed in Chap. 2. The discussion so far in this chapter has been concerned largely with the security and other concerns that a party may have over disclosure of the facts or data reflected in the reporting. However, the events reported upon may constitute war crimes or, depending on the nature of the conflict and/or on the status of the individual participating in it, the events may be breaches of the applicable domestic criminal law. Journalistic reporting may be an important factor in motivating repression of breaches of the law of armed conflict,[50] and more specifically in dissuading their commission in the first place. Clearly, the reporter's material will constitute evidence that may, depending on its admissibility according to the evidence rules of the relevant tribunal, be capable of supporting a charge against those perpetrating the crime.[51]

The dramatic increase in the quantity and availability of such material has important strategic implications given the obligations in the Geneva Conventions and in API to repress breaches.[52] The posting on the Internet of footage disclosing the commission of war crimes places the state concerned on notice that the allegation has been made and the obligation to take appropriate action to repress such breaches therefore arises. A state that simply ignores the evidence and that takes no sufficient action to repress therefore potentially commits a double breach of international law, firstly in respect of the conduct amounting to the war crime and second in respect of its failure to deal with the matter properly or at all. In sum, it is now very much more difficult for a state to deny that it is aware of an allegation that such a breach has occurred.[53]

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[50] Consider Vöneky 2013, pp. 649–650.

[51] Note that a journalist who witnesses atrocities while undertaking his journalistic duties can only be compelled to testify in criminal proceedings for an international crime if it is shown that the evidence sought is of direct and important value in determining a core issue in the case. In addition, it must be shown that the evidence sought cannot reasonably be obtained elsewhere; *Prosecutor v. Radoslav Brdjanin and Momir Talić*, Case Number IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, paras 34–50.

[52] See Geneva Convention I, Articles 49–54; Geneva Convention II, Articles 50–53; Geneva Convention III, Articles 129–132; Geneva Convention IV, Articles 146–149 and API, Articles 85–88.

[53] The first breach consists of the activity that amounts to a war crime and the second breach consists of the failure to take the action prescribed by the relevant treaty to repress such war crimes.

11.6 New Trends in Warfare and the Media

Journalistic reporting is unlikely to be directly affected by the fact that attacks, for example, are conducted using unmanned or cyber technologies. Indirect effects are, however, foreseeable. The secretive, concealed and/or remote character of cyber operations and of unmanned attack operations makes it more likely, certainly in the immediate future, that journalistic reporting will depend to a significant degree on what the party using such techniques is prepared to disclose. Reporters will of course continue to view the scenes of unmanned attacks, interview survivors, photograph the damage, discuss whether the assumed target was in fact engaged, discuss which party actually undertook the attack and so on. The location from which the attack is launched and the person who undertook it are, however, likely to remain concealed. Ironically, while parties to the conflict may welcome that state of affairs in the short to medium term, there may come a time when parties to the conflict will wish it to be publicly understood that they were not responsible for a particular attack or other military event or that the interpretation of events based on the material summarized in this paragraph is in some way false.

The rapid development in computer technology and in broadband Internet access comes at the same time as the development of these unmanned and cyber attack technologies. Taking these twin elements together, the effect is that private individuals and groups with a sufficient technical understanding will in future be able to locate, penetrate and, foreseeably, in due course to manipulate strategic level government computer and communications systems, military computer-based systems and the computer networks that control the operation of weapon systems.[54] It will likely become possible for suitably competent hackers to affect the operation of a weapon, perhaps even to change the target it is intended to attack, or the manner in which an attack is undertaken. This potentially exacerbates the deception issues discussed in Chap. 4. It would make determination of responsibility for attacks problematic and would likely confuse the conduct of military operations. Perhaps, governments should be cautious about keeping media agencies too much at arms length, if, that is, the cooperation of such agencies is likely to be required should technology and its employment progress in the manner contemplated here. Put simply, if cyber deception operations by adverse parties to the conflict and by private hackers develop as seems at least possible, governments are likely to need to develop a sophisticated relationship with the mass media in which matters that must remain protected by secrecy are respected while events that the governmental authorities wish to publicise are appropriately reported.

[54] Consider, for example, the basis of the revelations by Edward Snowden, including as to intelligence gathering by US agencies and as to information-gathering allegedly being undertaken by Britain from an undisclosed base in the Middle East reported in Campbell et al. 2013, available at www.independent.co.uk/news/uk/politics/exclusive-uks-secret-mideast-internet-surveillance-base-is-revealed-in-edward-snowden-leaks-8781082.html.

Achieving such a relationship with 'the press' implies a blend of mutual trust and respect, if necessary backed up by suitable legislative provision within the limits prescribed by the human rights rules discussed in the previous section.

In Chap. 7, we discussed direct participation by civilians in armed conflict hostilities noting the implications for the civilians concerned. The distinction between activities that amount to direct participation and those that do not must necessarily be applied with care when considering the use by civilians of new technologies. The mere fact that a civilian takes and posts on the Internet imagery of events provoking reactions hostile to one party to the conflict does not per se mean that that civilian is taking a direct part in the hostilities. The absence of belligerent nexus, for example, will be significant. However, it is conceivable that civilians will obtain and disclose information, for example, as to the operational planning of a party to the conflict. Disclosing such information may severely prejudice the military interests of that party, and if the elements of direct participation that we discussed in Chap. 7 are present, the civilian concerned will lose civilian protection while so engaged. As we noted earlier in this chapter, journalists should also be careful to ensure that their reporting does not amount to direct participation.

During internal security operations, the domestic law of the relevant territory and human rights law will determine whether those reporting on the events, whether for mass media outlets or in a private capacity, commit offences.

Protection of civilians and of specially protected persons in armed conflict is liable, if anything, to be enhanced by the tendency towards wider reporting of incidents, including war crimes, through mass media outlets and by individuals. Information derived from such sources as to the actual effect of attacks will be available to inform the decisions of targeting staffs both as to the effects of past attacks and as to the performance of weapons and of methods of warfare employed. Such information may be considered by targeteers when deciding on the appropriate way of prosecuting future attacks and may dissuade those who, absent such reporting, might be inclined to breach targeting law.[55]

The reporting, whether by mass media or by individuals using Internet-linked modern communications technologies, of remote attacks may raise issues of jurisdiction. Remoteness may, indeed, characterize not only the attack but also the reporting of it. Let us take as an example an attack undertaken during an international armed conflict from one country that is a party to the conflict, using either a remotely piloted platform or a cyber tool, against a target located in another party to the conflict. Reporters and private individuals based in neither country observe and report on the effects of the attack both through the mass media and on the Internet. Acting in concert, they also penetrate the computer systems of the agency that undertook the attack and prepare and publish accounts of what occurred.

[55] Whether such information is in fact taken into account to the degree that arguably it should is, of course, a distinct issue. It should, however, be part of the 'information from all sources' referred to in UK statement (c) made on ratification of API on 28 January 1998.

These accounts disclose the details of the weapon that was used, who designed it, how it worked, the manner in which it was possible to ensure that the weapon would evade detection and who was responsible for deciding that the attack should take place. These are all details the publication of which would probably be prohibited by the domestic official secrets and emergency legislation within that country. The national authorities are likely to be unable to prevent the publication of the relevant information, and national security is liable to suffer accordingly. While disclosures of sensitive information outside the jurisdiction are nothing new,[56] it is the potential for individuals and media through the Internet to gain access to highly classified material that seems to constitute a significant change. Whether over time this will cause a re-evaluation, and perhaps reduction, of the information that must be protected through classification, or whether technology will enable more effective protective measures than currently seem possible remains to be seen.

Effects-based attacks, as we noted in Chap. 6, seek to achieve a specific effect of strategic or operational value by attacking a particular individual or object in a manner that has been designed accordingly. If effects-based operations are going to have a meaningful future, carefully managing the media reporting of such an event will be critical to the accomplishment of the desired effect. So, for example, imagine that a military objective is selected for attack because of some additional beneficial effect attacking the object is expected to have on the willingness of the population in the target state to continue to support the war. The media reporting of the attack both in the domestic media of the targeted state and in any other media to which the relevant population has access will likely be critical in informing the population's response to it. Coverage on the Internet or in the mass media, for instance, that represents the attack as unlawful, disproportionate, unwise or otherwise inappropriate will likely adversely affect the prospect of achieving the intended effect.

We can conclude that future technologies may require states to have a carefully managed relationship with the media and, by extension, with populations which, as we have seen, are being empowered by the development of Internet-linked mobile digital communications technology. The imposition of draconian prohibitions on reporting of certain military activities may no longer be appropriate to the modern age. Achieving some kinds of military effect may pre-suppose a degree of sympathetic media coverage. Engagement by states with the mass media and limiting reporting restrictions to that which absolutely must be kept secret would seem to be the way ahead. But even then, absolute secrecy may be a thing of the past and it may in future prove necessary for states to undertake all aspects of future war in the glare of media publicity, reporting and comment.

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[56] Consider, for example, the proceedings taken by the UK Attorney General against Peter Wright in 1987 and 1988 in respect of the publication of the former MI5 agent's memoirs in Australia, proceedings that eventually had to be abandoned. By late 1987, the book was the number one hardback best seller in the US selling 400,000 copies; Norton-Taylor 1988, available at www.guardian.co.uk/fromthearchive/story/0,12269,1326319,00.html.

11.7 Journalism, the Internet and Public Attitudes to Human Rights

The question to consider in this short section is whether the trends we have been discussing are likely to influence public attitudes to the applicability of human rights law in armed conflict. The answer may lie in popular reactions to the images, reports, sounds, eye-witness testimony and other material that is received with increasing immediacy and in ever more vivid form in the living rooms of the nation. Is it possible that this consequence of modern technology is precipitating a growing popular revulsion with armed conflict in general and with the bloodshed and damage associated with it in particular? While zero casualty war, that is the conduct of operations on the basis that the attacking party will remain relatively immune from counter-attack, has aroused the ethical and moral critique summarized in Chap. 6, the images of injury, death and damage seem to precipitate an emerging public view that in some kinds of conflict any death in war, including of opposing combatants, is unacceptable. It will be for other researchers to establish whether popular perceptions are in fact evolving in this way and whether such evolution is indeed attributable in whole or in part to reporting styles, media and immediacy. The tendency to seek to apply human rights law norms more extensively during armed conflict than was hitherto the case certainly comes at a time when media reporting has become more immediate, extensive and has frequently focused on emotive casualty related footage. Whether the two tendencies are causally linked remains to be seen.

A further complication is added to the mix when we consider cyber deception operations of the sort mentioned in Chap. 4. That complication stems in part from the very immediacy of media reporting. We have already noted in Chap. 4 the foreseeable need for parties to the conflict to be aware that their computer systems may be vulnerable to interference from the adverse party and that things may not be as they appear. We also discussed the implications of extensive cyber deception operations for the practical application of the principle of distinction. Those same deception operations also have implications for future reporting of hostilities and indeed of wider military operations. Undoubtedly parties to some armed conflicts already seek to mislead the media and thus influence media reporting in their own favour. The significant new point is that the use of cyber technologies seems likely to make media manipulation through such deception operations easier to achieve, but not necessarily easier to detect. Maintaining credibility in the medium to long term may require media outlets to take appropriate steps to counter this threat.[57]

[57] With regard to the adverse effects of inaccurate media reporting both of issues of fact and of the applicable law, see Newton 2013, pp. 248–249.

11.8 When Law Becomes Part of the Spotlight

The title of this chapter refers to the spotlight, and it would be a mistake to imply that this spotlight effect is limited to mass media and private communications employing modern technologies. Action taken by the armed forces during armed conflicts is increasingly the subject of legal action and that activity, undertaken at both the international and domestic court levels, can have profound effects on the way the battle is fought. For the purposes of this discussion, therefore, it is logical to regard the various kinds of proceedings, and the disparate fora in which they are conducted, as another and important element in the 'spotlight'.

11.8.1 Coroners' Courts

Under the Coroners and Justice Act 2009[58] a Senior Coroner in England and Wales who is made aware that the body of a deceased person is within that Coroner's area must as soon as practicable conduct an investigation into the person's death if, inter alia, the deceased died a violent or unnatural death, if the cause of death is unknown or if the deceased died in custody or otherwise in state detention.[59] The purpose of such an investigation is to find out the identity of the deceased, how, when and where the deceased came by his death and certain additional particulars.[60]

Accordingly, if a member of the UK armed forces is, for example, killed while on active service in a foreign country and his body is returned to a place within the area of a senior Coroner, the obligation to conduct an investigation under Section 1 of the Act arises.[61] Evidence given before such an investigation will provide an account of the circumstances of the death and may reveal evidence justifying further proceedings, for example, in pursuit of a claim for compensation. Decisions relevant to the events giving rise to the death are liable to be explored in the course of the proceedings to the extent they are relevant to the matters the Coroner is required to investigate.[62] So decisions, e.g. of officials and armed forces

[58] 2009 c. 25.

[59] Coroners and Justice Act 2009, Sections 1(1) and (2).

[60] Coroners and Justice Act 2009, Section 5(1). To ensure compliance with the requirements of the European Convention, the second purpose should be interpreted as discovering in what circumstances the deceased came by his or her death; ibid. Section 5(2). It should be noted that the Act includes provision specifically applicable to deaths of armed forces personnel on active service at the time of their death.

[61] Equivalent but not identical arrangements for the conduct of investigations in Scotland are to be found in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

[62] A Coroner's investigation into the death of a member of an adverse party to an international armed conflict is unlikely to take place if the death took place abroad, simply because no body is likely to be in the senior coroner's area. However, friendly fire incidents in which a member of the UK armed forces is killed as a result of an act of another UK service person or of friendly

personnel connected with hostilities may be inquired into by the senior Coroner if pertinent to the matters he is required to address.

11.8.2 Other Inquiries

A variety of other inquiry processes can be used to investigate events that may occur in the course of hostilities or otherwise in connection with an armed conflict. Under Section 343 of the Armed Forces Act 2006 and associated regulations,[63] the UK Defence Council has wide powers to order the holding of a Service Inquiry into any matter involving the armed forces that it considers should be the subject of an inquiry. Such an inquiry would be an appropriate means of investigating events, whether associated with an armed conflict or otherwise, which do not involve the suspected commission of an offence. If there are reasonable grounds to suspect the commission of an offence, generally speaking the matter should be referred immediately for police investigation, although in certain somewhat exceptional circumstances it may be feasible to conduct a police investigation and a Service Inquiry at the same time.

The Inquiries Act 2005 provides for the holding of public inquiries into matters of major public concern.[64] Clearly, events arising during and in connection with an armed conflict or an internal security situation short of an armed conflict are capable of coming within the potential scope of these arrangements. So, for example, on 14 May 2008 the then Secretary of State for Defence announced the establishment of such an inquiry into how and why an Iraqi national, Baha Mousa, died in British military custody in September 2003. Similarly, on 25 November 2009 the then Secretary of State for Defence announced the establishment of such an inquiry to investigate allegations that Iraqi nationals detained after a firefight in 2004 had been unlawfully killed while at a British camp and that others had been mistreated at that camp and later at a detention facility.[65]

(Footnote 62 continued)
forces may give rise to a Coroner's investigation. Such an investigation may, in order to determine the circumstances of the death, have to inquire into targeting decision-making and other military matters involving another state.

[63] The regulations that prescribe the administrative and other arrangements for Service Inquiries are the Armed Forces (Service Inquiries) Regulations 2008 (S.I.2008/1653).

[64] 2005 c. 12. For an explanation of the legislation, see the Explanatory Notes, available at www.legislation.gov.uk/ukpga/2005/12/notes/contents.

[65] The transcripts and evidence called in the al-Sweady Public Inquiry can be viewed at www.alsweadyinquiry.org. The Public Inquiry was established pursuant to a statement on 25 November 2009 by the then Secretary of State for Defence and is, at the time of writing, considering evidence relating to allegations that Iraqi nationals were detained by British soldiers in Iraq in 2004 and were unlawfully killed at a British camp and that others were mistreated at that camp and at a detention facility. The Inquiry was established under the Inquiries Act 2005 and is chaired by a retired High Court judge.

11.8.3 Criminal Courts

The obligations placed on states to repress grave breaches of the Geneva Conventions and of API have been reflected in UK legislation, respectively, in the form of the Geneva Conventions Act 1957[66] and the Geneva Conventions (Amendment) Act 1995.[67] In addition, the International Criminal Court Act 2001[68] was passed to reflect in the law of England and Wales certain provisions of the Rome Statute of the International Criminal Court, most relevantly the provisions as to genocide, war crimes and crimes against humanity.[69]

Under the Armed Forces Act 2006, Section 42, any act which is punishable under the law of England and Wales is also a service offence and thus susceptible to the jurisdiction of the UK armed forces service courts.

The combined effect of these provisions is that the United Kingdom civilian criminal courts can exercise jurisdiction in respect of genocide, war crimes and crimes against humanity on the basis of the universal jurisdiction arrangements set forth in the relevant treaties and UK legislation enables an accused person to be charged with the relevant crime thus fully meeting the Rome Statute provisions as to complementarity in respect of the nature of the charge brought.[70] The provisions also have the effect that charges reflecting war crimes, genocide and crimes against humanity can be brought against UK armed forces personnel before the UK service courts in appropriate circumstances.[71]

Proceedings of this nature may, of course, arise from any of a multitude of circumstances, but the point of relevance to the present chapter is that the resulting proceedings will usually be held in public, that the evidence given and arguments tendered can be reported upon in the media and that as a result transgressions, or alleged transgressions, can attract adverse publicity and comment and thereby can affect public perceptions as to the appropriateness of the military campaign or of the manner in which it is being conducted.[72]

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[66] 1957 c. 52. See in particular Section 1.

[67] 1995 c. 27. See in particular Section 1.

[68] 2001 c. 17.

[69] International Criminal Court Act 2001, Sections 50–74.

[70] See Rome Statute, 1998, Article 17.

[71] The additional significance of this statement is that the UK service justice system permits trials to be undertaken anywhere in the world. For a discussion of the detailed provisions relating to war crimes, crimes against humanity and genocide, see Corn et al. 2012, pp. 466–500.

[72] As to the offences for which domestic legislation should permit the domestic criminal courts of a state to entertain proceedings, see Vöneky 2013, pp. 670–682.

11.8.4 Judicial Review, Human Rights Proceedings and Challenges at the Political Level

The jurisdiction of the UK High Court to review judicially the decisions of public authorities is applicable to certain decisions that may have relevance to the conduct of an armed conflict. The judicial review process in England and Wales is regulated by Rules of the Supreme Court, Order 53, and applies to every decision, or failure to make a decision, by such a public authority. The grounds on which a challenge may be mounted include that the relevant decision was unlawful (including situations in which the decision maker acts outside the powers accorded to him), that the decision was irrational (in the sense that it was not a decision that an appropriately directed decision maker could possibly have reached) or that there was some procedural impropriety associated with the decision such as to render it invalid (for example, a breach of the fundamental rules of natural justice or a failure to comply with procedural requirements set forth in the rules associated with the relevant decision). Judicial review is to be contrasted with an appeal on the merits; in the case of an appeal, the focus will tend to be on the facts and circumstances of the matter rather than on the way in which the decision was reached.

Thus, procurement decisions in relation to Snatch Land Rovers[73] and decisions as to the holding of a public inquiry into armed forces' detention policies in the

[73] Consider, for example, proceedings brought by Susan Smith, the mother of a British soldier killed in a Snatch Land Rover in Iraq; 'Mother of British Soldier Killed in Snatch Land Rover wins legal battle, The Telegraph 2009, 10 July, available at www.telegraph.co.uk/news/newstopics/onthefrontline/5795852/Mother-of-British-soldier-killed-in-Snatch-Land-Rover-wins-legal-battle.html. In the resulting proceedings taken by relatives of soldiers killed by improvised explosive devices (IEDs) while travelling in such Snatch Land Rovers, the claimants argued that the UK Ministry of Defence had failed to provide suitable armoured equipment to protect against IEDs, had thus been negligent and had breached the Article 2, European Convention, right to life. In an associated case relatives of soldiers killed or injured in a Challenger II tank in Basra, Iraq, as a result of a friendly fire incident claimed that the UK Ministry of Defence had been negligent by failing to provide available technology and training to protect against the risk of friendly fire. The claims in negligence raised issues of combat immunity. In very broad terms, the combat immunity principle under English law precludes claims in negligence relating to decisions made in the conduct of combat. The Supreme Court addressed the jurisdiction issue in the light of the Al Skeini judgment of the European Court, and concluded that "the jurisdiction of the United Kingdom under Article 1 of the Convention extends to securing the protection of Article 2 to members of the armed forces when they are serving outside its territory"; *Smith and others, Ellis, Allbutt and others v. Ministry of Defence* [2013] UKSC 41, judgment dated 19 June 2013, para 55; in relation to planning for and conduct of military operations in armed conflict "the Court must avoid imposing positive obligations on the State […]. which are unrealistic or disproportionate" but must give effect to those obligations where it would be reasonable to expect the individual to have the protection of Article 2 of the European Convention. It would therefore be easier to find the decision beyond the scope of Article 2 if it relates, e.g. to procurement or higher level command of military operations where the decision is closer to the exercise of political judgment or policy or if the decision is by a person actively engaged in contact with the enemy; see *Smith and others, Ellis, Allbutt and others v. Ministry of Defence* para 76. On the matter of combat immunity, "The court must be especially careful, in [the case of members of the armed forces], to

context of allegations of mistreatment of prisoners[74] have been the subject of legal challenge. At the political level, dependants of those who have died on military operations as a result of perceived procurement failures have directly challenged Ministers on the matter, for example, in relation to the equipping of armed forces personnel with flak jackets,[75] and the lawfulness of political decisions associated with armed conflict, such as the invasion of Iraq in 2003, have also been the subject of applications for judicial review.[76]

There are, however, limits on the extent to which the High Court will be willing to entertain applications for judicial review.[77]

Proceedings of this nature expose to public examination, judicial assessment and media comment the conduct of armed conflicts and the decisions that public officials must make about related matters. Some such applications will ultimately be rejected by the court, such as was the case in the Gentle case, but the completion of an initiating application under Order 53, particularly when the subject matter is emotionally charged, controversial or otherwise highly newsworthy, will cause public attention to focus closely on the relevant decision, on the person or organization that took it and the reporting of the proceedings and their result will contribute to the formation of a public view. The outcome of the legal process, even a rejection of the application or a positive finding that the relevant decision

(Footnote 73 continued)
have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable"; *Smith and others, Ellis, Allbutt and others v. Ministry of Defence* para 100.

[74] See Cobain 2010, available at www.guardian.co.uk/law/2010/jul/16/army-torture-iraq-judicial-review.

[75] See 'Hoon to meet shot soldier's widow', The Telegraph 2004, 16 January, available at www.telegraph.co.uk/news/1451830/Hoon-to-meet-shot-soldiers-widow.html.

[76] See *R (on the application of Gentle and another) v. Prime Minister and others* (2008) UKHL 20 in which the House of Lords decided that Article 2 of the European Convention does not imply any obligation for the Government to take reasonable steps to satisfy itself of the legality of an invasion of another country under international law. Consider also the US case of *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum In Support of Defendant's Motion to Dismiss.

[77] Note, for example, the judgment by Lord Justice Moses in the case of *Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC3728 (Admin) in which the claimant was refused permission to challenge by way of judicial review the Secretary of State's 'decision' as to the passing of intelligence by officers of the Government Communications Headquarters to forces of the United States allegedly in support of US drone strikes in North Waziristan, Pakistan. The application was denied in part on the ground that any such proceedings would inevitably involve the UK courts adjudicating on the lawfulness of US military action there. *Underhill v. Hernandez* (1897) 168 US 25, 252 (Chief Justice Fuller) and *Kuwait Airways Corporation v Iraqi Airways Co* [Nos. 4 and 5] 2002 2 WLR 1353, 1362 are authorities for the proposition that courts will neither consider nor adjudicate on the sovereign acts of a foreign State. An appeal against Lord Justice Moses' decision is pending (to be heard from 29 to 31 October 2013).

was properly made, will of course not necessarily determine the popular appreciation as to the rights and wrongs of the matter.

11.8.5 International Courts and Tribunals

The International Court of Justice addresses issues between states[78] and its jurisdiction comprises all cases that the parties refer to it together with certain matters specially referred to in the UN Charter and in specific treaties.[79]Ad hoc tribunals may involve international arrangements for the consideration and adjudication of matters coming within their jurisdiction. In this and the following paragraph, we will briefly consider the relevant arrangements associated with two such ad hoc tribunals. The relationship between other such tribunals and national courts will be provided for in the relevant Statute or other establishing instrument.

Under the ICTY Statute,[80] the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law[81] committed in the territory of the former Yugoslavia since 1991. Under the Statute, national courts and the International Tribunal have concurrent jurisdiction, but the International Tribunal has primacy over national courts and can, at any stage, ask national courts to defer to its competence.[82]

The ICTR Statute[83] grants the International Tribunal for Rwanda the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such serious violations committed in neighbouring States in 1994. Genocide, crimes against humanity and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II are respectively listed as the offences susceptible to the jurisdiction of the International Tribunal.[84] Again, national courts and the International Tribunal for Rwanda have concurrent jurisdiction in

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[78] Statute of the ICJ, Article 34(1).

[79] Statute of the ICJ, Article 36(1).

[80] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993.

[81] The relevant offences consist of committing or ordering to be committed grave breaches of the Geneva Conventions, violations of the laws and customs of war including the examples listed in Article 3, genocide and crimes against humanity; Articles 2–5.

[82] ICTY Statute, Article 9.

[83] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994, 8 November 1994 (ICTR Statute).

[84] ICTR Statute, Articles 2, 3 and 4.

relation to the offences referred to in the Statute, but the International Tribunal has primacy over all national courts and may at any procedural stage formally ask national courts to defer to its competence.[85] Mixed tribunals, which combine international and domestic elements, have also been established in relation, for example, to Cambodia,[86] Sierra Leone,[87] East Timor[88] and Kosovo.[89]

The establishment of a standing international court for the prosecution of offences of the sort we have been discussing was finally achieved in 1998 with the adoption of a treaty, the Rome Statute 1998, under which the International Criminal Court is established. While allegations against individuals of the commission of genocide, crimes against humanity, war crimes or the crime of aggression should normally be dealt with by the criminal courts of states having jurisdiction to deal with the matter, the International Criminal Court also has the power to exercise jurisdiction "over persons for the most serious crimes of international concern, as referred to in th[e] Statute, and shall be complementary to national criminal jurisdictions".[90] The Statute explains this notion of complementarity in Article 17 as follows:

The Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, para 3;
(d) The case is not of sufficient gravity to justify further action by the Court.[91]

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[85] ICTR Statute, Article 8.

[86] For a discussion of the Extraordinary Chambers in the Courts of Cambodia, see Kalshoven and Zegveld 2011, pp. 258–259.

[87] For a description of the Special Court of Sierra Leone, see Kalshoven and Zegveld 2011, pp. 259–260.

[88] The Special Panels for Serious Crimes in East Timor are discussed at Kalshoven and Zegveld 2011, pp. 260–261.

[89] See Kalshoven and Ziegveld 2011, pp. 261–262.

[90] Rome Statute, 1998, Article 1.

[91] Rome Statute, 1998, Article 17(1). In deciding whether there is unwillingness, the court will consider whether the person is being shielded from the ICC, whether there is unjustifiable delay inconsistent with an intent to bring the person to justice and whether the proceedings are not independent and impartial and were being conducted in a manner inconsistent with an intent to bring the person to justice; Article 17(2). In deciding whether there is inability, the Court will consider whether there is a total or substantial collapse or unavailability of the national judicial

Provisions of this nature provide a degree of international assurance that criminal activity of the sort referred to in the Statute will not go unpunished. The International Criminal Court and the ad hoc tribunals therefore represent additional fora in which the conduct of hostilities, or crimes against humanity or genocide which do not pre-suppose a state of armed conflict, can be judicially and independently evaluated after the event and in public and in which persons who have suffered as a result of these serious crimes may experience justice.

11.9 'Lawfare' or 'Politics'?

The thing that all of the media and judicial procedures discussed in this chapter have in common is their potential to bring to public attention certain events that may have occurred in the course of armed conflict or of internal security situations falling short of armed conflict. The medium or procedure may not achieve this alone. Self-evidently, the broadcasting medium requires the images, sound recordings, eye-witness testimony or other raw information on which to base its news report. Moreover, the purpose of the judicial and/or inquisitorial processes will not be the publicizing of the events giving rise to them. Their purpose will be, for example, the clarification of the circumstances giving rise to a death; the determination of the guilt or innocence of a person charged with an offence; the assessment of whether human rights norms have been breached in a particular case; or a decision as to whether administrative law requirements were complied with when a decision was made by a public authority.

It is the combination of, e.g. legal proceedings arising from emotively charged events and extensive media coverage that has the potential significantly to affect public opinion. The broadcasting media coverage is the catalyst as it were. Similarly, mobile phone images of distressing events, for example, will produce an emotive response in those to whom they are sent, but will require some form of dissemination, for example, through the broadcasting media, to generate a mass impact.

The interesting question that arises from these somewhat self-evident truths is, so what? The answer lies in the potential for actors in each of the media and judicial processes we have mentioned to influence public sentiment, possibly in a strategically significant way by means of this combined effect we have identified. Dispassionate, clinical broadcasting of factual data can of course in itself generate emotive audience responses, but that is not what is being discussed here. Explanations of the contextual circumstances, again based on objective, politically neutral statements of fact, assist the audience to appreciate the significance of what

(Footnote 91 continued)
system such that the state cannot obtain the accused, the required evidence or otherwise cannot carry out its proceedings; Article 17(3).

has occurred and of what is being shown. Selectivity in the choice of images, of sounds, of witness accounts or of events to report can result in a more powerful message but will tend to distort the impression that the viewer, listener or reader receives with consequent skewing of his appreciation of events.

Charles Dunlap referred to 'lawfare' as the misuse of law as a substitute for traditional military means to achieve an operational objective.[92] The 'law' that is misused may, for example, consist of a treaty provision,[93] human rights norms, rules as to liability in damages or the procedures associated with the investigation of deaths. So, for example, a party to an armed conflict might use sympathetic claimants, lawyers, witnesses, even judges to pursue litigation based on false allegations of assault, mistreatment, unlawful attacks, etc. A carefully orchestrated series of false allegations of this nature may be expected to have a significant effect on support for the armed conflict in a liberal democracy. Charles Dunlap describes this purpose of eroding support for continued involvement in the armed conflict as a kind of Vietnam effect[94] and comments that there are different ways in which law can be misused.[95]

However, Christopher Waters, referring to the notion of lawfare, and to the related UK notion of 'legal encirclement'[96] of the military, argues that these metaphors are misleading. He suggests that the military may well be interacting with the law to a greater extent than previously was the case, but contends that the military's core function, war fighting, has received a 'soft touch' by the law. He argues that an important factor in the relationship between the military and the law is the "failure of military and political leaders to send consistent strong messages about the importance of compliance with the law". It would seem more accurate to suggest, however, that it is the very emphasis that the military places on legal compliance that feeds the growing concern that is felt about legal encirclement. Such concern would necessarily be less pronounced were the military to place less value on adherence, and perceived adherence, by them to legal norms.[97]

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[92] Presentation by Brigadier General Charles J Dunlap to Air and Space Conference and Technology Exposition 2005 on 13 September 2005, entitled 'The law of armed conflict', 1; the text is in the author's possession.

[93] An example would be the deliberate placing of human shields in the vicinity of a military objective in the knowledge that their presence will affect proportionality based decision-making.

[94] Dunlap, n. 92 above, pp. 2–5.

[95] Dunlap, n. 92 above, p. 5.

[96] The idea of 'legal encirclement' reflects the notion that the military is under legal siege, that it is being pushed by people not schooled in operations but only in political correctness towards a time when it will fail in operations because the commanding officer's authority and command chain have been compromised with tortuous rules not relevant to fighting "and where his instinct to be daring and innovative is being buried under the threat of liabilities and hounded out by those who have no concept of what is required to fight and win"; Admiral Lord Boyce, former Chief of the Defence Staff, UK House of Lords, Official Report, vol 673, c. 1236 (July 2005).

[97] Waters 2010, pp. 52–53.

Charles Dunlap's interpretation seems to be essentially correct but applies now somewhat more broadly. What we may expect to see in future conflicts, through the uses of the broadcast and print media, of private digital media using the Internet and of judicial processes, alone or in combination with one another, is the conduct of war by other, essentially political, means. Clausewitz's famous dictum is essentially thrown into reverse. It goes rather wider than Charles Dunlap's formulation of 'lawfare', and by doing so has a potentially even greater, more decisive influence on events and perceptions.

11.10 Lawfare in the Digital Age

Continuing with the analysis, we should consider how the developments in the future conduct of conflict that we have considered in this book may be expected to affect lawfare. It would seem likely that the empowerment of ordinary citizens to challenge decisions that cause them or those close to them loss, injury, distress or annoyance will continue and, if anything, that it will become more extensive. While casualties caused by enemy action in warfare may sometimes be accepted, the unwillingness to accept casualties or loss attributable to acts of members of one's own force or to the acts of allies[98] is understandable and, with continuing developments in technology, is likely to become more deep-rooted. The wish to determine who was to blame, and/or to identify and disclose observable or perceived systemic failures is rational; the legal and policy avenues for doing this seem likely with time to become more rather than less numerous and accessible, and this seems likely to impose increasing resource demands on already stretched government departments. Nevertheless, military forces often, after an armed conflict, seek to determine 'what went right and what went wrong' and to learn appropriate lessons for the benefit of future operations, a worthy process that should continue.[99]

There is a worry, however, that the litigiousness and the blame culture that have come to permeate society at large are now starting to influence responses to events in warfare. The differing motives of those involved in litigation in its broadest sense may include, for example, obtaining a clearer understanding of particular past events, personal financial gain, influencing public attitudes to an armed conflict or to military operations in general, achieving personal profile and reputation or securing change in policies associated with an armed conflict. The

[98] Such events are frequently referred to as 'blue on blue' incidents. They can arise for numerous reasons including, for example, defective communications, inadequate care in target observation or selection, insufficient or deficient information, enemy deception operations, inadequate equipment, inadequate training of personnel, the confused nature of the battle space and the stress of combat.

[99] Personal knowledge of the author who served for 30 years as a member of the RAF Legal Branch.

relevant point is that while some actors, such as the next of kin in proceedings arising out of a death on operations, are likely to pursue the claim in order to obtain a clearer understanding of what occurred and perhaps, secondarily, to secure appropriate compensation, other participants in such processes may be seeking to advance additional agendas.

If these are features that to a degree we can observe already, how will they be affected by the core themes that we have been considering in this book, namely remote attack methods, pervasive cyber deception operations, the civilianization of the battlespace, effects-based operations, the depersonalization of warfare, asymmetry in warfare and the relationship between human rights law and the law of armed conflict.

Remote methods of attack, whether they involve cyber, autonomous, remotely piloted or space-based assets, will present observers, commentators, victims and their associates with potentially significant difficulty in determining who or what was to blame. We observed in Chap. 4 that while detection of the computer that was used to undertake a cyber attack may be possible, establishing, and subsequently being able to prove, who performed the cyber attack and whether that individual was acting on behalf of a group or a state is likely to be considerably more problematic. The fact that a cyber operation goes wrong, for example, and that civilians are injured as a result or civilian objects are damaged, will not of itself be a sufficient basis from which to conclude that a violation of the law of armed conflict, for example, justifying compensation under Article 91 of API, has occurred. Obtaining the necessary information to support such a claim is likely to be difficult.[100]

Mass media reporting of cyber operations is likely to be impeded by the considerable secrecy with which they are undertaken. Reporting would seem likely to focus on such effects as are immediately identifiable as the consequence of cyber operations. If, for example, a cyber attack by the enemy in a period of armed conflict were to target elements of the civilian national infrastructure, an inability of national authorities to explain the cause of the infrastructure failure may be expected to have adverse impact on public confidence and/or morale.

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[100] It should be borne in mind that the onus of proof is likely to rest with the claimant. The claimant will need to demonstrate that civilians, civilian objects or persons or objects granted specific protection by the law of armed conflict were the object of the attack. Frits Kalshoven writes that he is not persuaded that collateral damage should be the basis for individual compensation for a violation of the law of armed conflict; Kalshoven 2007, p. 212. The nature of cyber operations may, for the foreseeable future at least, make such compensation claims problematic. Even if these things can be demonstrated, it would still be necessary to show that the case demands that compensation be paid. Note the provision in Article 90 of API for a Fact Finding Commission to enquire into facts alleged to be a grave breach or other serious violation of the Geneva Conventions or of API and consider Knut Dörmann's criticism that only a small number of states have accepted the competence of the Fact Finding Commission and as to the unwillingness of parties to an armed conflict to request or give their consent to an investigation; Dörmann 2007, p. 238. For a more detailed discussion of the Commission's intended operating procedures, see Bothe 2007.

Pervasive cyber deception operations are liable to have an important effect on media reporting and on litigation in the various fora referred to in this chapter. In this regard, it is critical to recall the highly relevant UK statement made on ratification of API.[101] If, as discussed in Chap. 4, cyber deception operations have the effect of rendering unreliable, or of falsifying, important information available to a decision maker, this may critically affect responsibility for decisions based on that information. Press coverage in the immediate aftermath may centre on the apparent illegality of an attack decided upon by reference to such false information. Any legal proceedings after such an event will only proceed on a factually accurate basis if the deception operation, whatever its form, becomes known to those involved in the litigation. If the cyber deception or manipulation operation by the enemy remains undetected, the adverse effects of the cyber operation will probably appear to be attributable to the acts or negligence of the victim state authorities, and may be expected to have an adverse effect on popular support for the armed conflict, which may of course have been their original purpose. In short, deception may well work and is likely to be hard to counter, until, that is, it becomes the recognized norm or until technology renders it more easily detectable.

It is difficult to be sure as to the media impact of civilianization of the battle space. There are, of course, two dimensions to the civilianization process. The first consists of substitution of civilians for military personnel in billets that were traditionally the preserve of armed forces personnel. This may be associated with the letting of a contract to a corporation to supply the associated services to the armed forces. Alternatively it may consist simply of the direct recruitment of civilian state employees to fill the relevant posts. The second dimension arises due to the changing nature of conflict. There will, for example, be a tendency in numerous states to employ civilian personnel to undertake in peacetime cyber operations that, during periods of armed conflict, may be regarded as direct participation in the associated hostilities.

Acknowledging these twin dimensions, it is foreseeable that attacks by our adversaries that target civilians and civilian objects will continue to attract the most condign and proper media criticism. It is, however, not certain that the potential impact of civilianization in increasing the range of objects and of persons that it would be lawful for the enemy to attack will be readily recognized by a press that is bound to be partisan in its coverage of events associated with warfare. The media coverage of warfare may continue to regard the geographical area of legitimate hostilities as excessively restricted, failing to grasp the implications of direct participation by civilians that may involve activity distant from the perceived 'front line' and located on the territory of participating western states. Legitimate acts of war are liable to be characterized, erroneously, as 'terrorism' in media coverage, and it will be critical that decision makers such as the judiciary

[101] On ratification of API on 28 January 1998, UK stated, inter alia, "Military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time"; statement (c).

fully grasp the relevant issues and complexities. The principle of distinction, so critical to the effective protection of genuinely uninvolved civilians, requires no less. A clear understanding of the principle, properly informed judicial decision-making, legally accurate reporting and an informed public discourse are all essential. Talking in vague terms about civilian casualties is no longer acceptable. The relevance of direct participation needs to be more widely understood.

Effects-based attacks that have lawful targets as the object of attack do not raise unusual issues if they come within the spotlight to which this chapter refers. It will be for those ordering such operations to decide whether the intended additional effect will be rendered more achievable by coverage in certain media and, if so, how to arrange this. Attacks that make non-participating civilians or civilian objects the object of attack should properly be characterized in media coverage as war crimes. Whether press comment will support an argument that seeks to justify such attacks on effects-based grounds remains to be seen. More considered media coverage will appreciate the dangers implicit in adopting such an approach. Psychological operations will be an increasingly important aspect of future military campaigns.[102] Ensuring a coherent message in domestic mass media and other media coverage will be critical in maintaining a consistent and thus convincing psychological campaign. Cyber and other means are likely to be employed in the attempt to deliver through enemy media messages that support the chosen psychological strategy.[103] So to the extent that psychological operations are vital to the outcome of future campaigns, proper media handling by parties to the conflict will be a priority.

Media coverage of the progressive depersonalization of hostilities will do much to determine public attitudes. As noted in Chap. 4, since 2002 the use of remotely piloted aircraft to undertake attacks has become rather mainstream.[104] This does not necessarily mean that autonomous attack would be seen in the same light. One might imagine the sorts of headline that may appear in popular press coverage of such events but more serious analysis in informed media outlets is likely to focus on ethical concerns about machines making life or death decisions. If such technologies are to gain public acceptance, careful presentation of the case for doing so will be required. While detailed public understanding of the technologies involved may be neither necessary nor achievable, there will need to be appropriate and

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[102] "In conflict and confrontation, most actors will place considerable emphasis and dependence on the psychological rather than just the physical. All military activity, including force, will continue to be designed to influence, and is likely to be planned and executed in support of a campaign narrative"; UK MOD Strategic Trends, p. 81.

[103] Consider, for example, the broadcasts during World War II of William Joyce, known as Lord Haw Haw, later executed in London for treason on 3 January 1946.

[104] Indeed it has clearly been a critical element in combatting terrorism effectively, but for an example of an attack in late August 2012 which engaged the intended target but also caused collateral casualties that arguably damaged the broader strategic purpose, see Terrorist drone strikes get scrutiny, New York Times 2013, 6 February, available at http://politics.heraldtribune.com/2013/02/06/terrorist-drone-strikes-get-scrutiny/.

rigorously implemented restrictions on the circumstances in which autonomous attack technology is employed, and public understanding of such measures is likely to be vital to public acceptance. Furthermore, policy makers and military commanders need to be sensitive to any expressed public concerns and a mature, informed appreciation of the issues will clearly be required. Inappropriate secretiveness is liable to provoke suspicion and, thus, to impede public acceptance.

Asymmetry per se is not the relevant issue. Rather, it is the sequence of reaction and counter-reaction to a situation of asymmetry that may involve breaches of international law. In Chap. 6 it was noted that some parties to conflicts that were asymmetrically inferior to their opponents seem to have chosen to employ unlawful methods of warfare to seek to counter that position of inferiority.

Cyber capabilities are undoubtedly a "powerful counter to technological asymmetry".[105] The use by a technologically inferior party of cyber capabilities does not, of course, necessarily suggest that the resulting cyber operation would be unlawful. So technological development may be giving asymmetrically inferior parties in armed conflict an enhanced range of options. Another such option is the use of mass media and personal communication technologies to undertake psychological and effects-based operations against the asymmetrically superior party. Indeed the foreseeable proliferation of offensive cyber techniques that are capable of intruding into, damaging, manipulating and/or taking control of target computer systems is liable to have an equalizing impact on asymmetric conflicts or is, at least, liable to redress the imbalance to a degree. The conflict can still properly be described as asymmetric, because the assets, resources, manpower and so on of the parties are not balanced. Their respective strengths and weaknesses lie in different fields of activity. But what we may see in the future, owing to this proliferation of cyber, communications and other such technologies, is asymmetric warfare in which neither party can properly be described in overall terms as inferior or superior. The previously asymmetrically inferior party would no longer be compelled to violate the law of armed conflict to survive and take the fight to the enemy. Whether technological proliferation will have the suggested effect of reducing disadvantage on the combat playing field and, if it does, whether that will, as has been suggested, result in reduced violations of international law remains to be seen. One can only hope.

The interaction between human rights law and the law of armed conflict has the potential to cause any amount of misunderstanding and difficulty in a number of the venues discussed in the present chapter. Because the two bodies of law abut one another, decisions by human rights courts as to the scope of application of human rights norms in times of armed conflict will of necessity determine the scope of application of the law of armed conflict. The decisions of the ICJ and of the European Court of Human Rights lead to the conclusion that human rights law applies at all times and that the 'specific rules in specific circumstances' approach discussed in Chap. 9 must be employed to determine which norm, human rights or

[105] Schmitt 2006, p. 33.

law of armed conflict, must apply in particular circumstances. It was argued in Chap. 10 that while the suggested approach appears accurately to reflect the decided cases, the result is, in its practical application, less than satisfactory. This state of affairs is likely, therefore, to lead to unsatisfactory, and perhaps mutually conflicting, decisions both in domestic UK courts, applying the Human Rights Act 1998, and in the European Court. Perhaps cases will have to be decided on their particular facts, with the result that discerning general rules for the guidance of future conduct, and of future judgments in the subordinate courts, may be difficult. Human rights norms, and the domestic law of the relevant territory, will however apply to all action by state authorities in relation to internal security operations that fall short of armed conflict.

Whether mass media reporting will accurately reflect this complex legal landscape is unclear. It is, however, vital that those preparing litigation for states accurately plead the relevant legal rules and that those deciding such cases respect the differences between the two bodies of law and, just as importantly, the differing functions that they were designed to fulfil.

11.11 Conclusion

It is difficult to over-state the degree to which armed conflict has changed in character in the last century or so, and much of that change is attributable to technological development, most recently in the communications sphere. War 'in a far-away country between people of whom we know nothing'[106] has been replaced by armed disputes in the global village. The notion of the army doing battle in some distant field far from civilian habitation is replaced by warfare in which civilian skills are increasingly critical to the outcome, in which civilians and their infrastructure are liable to be the object of attack by one at least of the parties and in which the technological sophistry that previously advantaged western states in war risks becoming their Achilles heel in an age of cyber attack and cyber deception.

In this 24 hour news world, the primary purpose of war will remain coercion, persuading the adversary to comply with our will. Eroding his will to resist continues to be the method of choice and the law will persist in requiring that only combatants, military objectives and directly participating civilians can be targeted with that purpose in mind. The immediacy of news industry and social media coverage of events will make the effective handling of the information war a constant headache. People whose business is fighting battles cannot hope to stay inside the information-processing loop of those whose professional business that

[106] "How horrible, fantastic, incredible it is that we should be digging trenches and trying on gas masks here because of a quarrel in a far-away country between people of whom we know nothing"; Chamberlain 1938, available at www.bbc.co.uk/archive/ww2outbreak/7904.shtml.

is. Moreover, lawfare activities will likely become increasing features of future warfare. The only sensible solution for western states is absolute honesty, and the employment of spokesmen who can communicate the practical difficulties in such a way that the viewing and/or listening and/or reading audience will appreciate.

During small and medium wars, legal and court business will tend to proceed as normal. While armed forces and their associated government departments may be stretched by the demands of combat and related activities, legal procedural requirements will still have to be met if litigation is to be conducted appropriately. Adequate resourcing of that litigation, and the maintenance of a suitably expert cadre of advocates and indeed of judges will be essential requirements if cases are to be handled properly.

The mobile phone industry shows no sign of slowing. Already incidents can be reported virtually contemporaneously, generating an increasingly comprehensive record of what takes place during internal security situations, on the battlefield and elsewhere. Closing down Internet traffic or mobile phone communications will tend to suggest that the party to the conflict taking such action has something unpleasant to hide, and indeed such actions are unlikely to 'win hearts and minds'. On the other hand, some degree of operational security will always be essential if an armed conflict is to be successfully prosecuted. There is a balance here which modern technology will probably make it hard to strike.

Journalists reporting on armed conflicts are entitled to the same protections as civilians who must not be made the object of attacks. However, this most fundamental rule of the law of armed conflict is too often breached in modern conflicts. Journalists in war zones perform the most valuable public service in exposing the conduct of the warring parties, in particular war crimes and other breaches of the law. Their reporting can help to promote compliance with international law and can serve to educate parties to the conflict as to what the law expects from them. Their position is often perilous, and too many of them become casualties of the conflict. It is therefore of vital importance that their protected status is respected at all times and by all of those involved.

To insist on an ideal world of accurate, factual and non-sensationalist reporting of military and security forces' activity that meticulously complies with applicable legal norms seems excessively idealistic. However, the sensible response by states to the challenges we have identified is to make sure that their internal security and armed forces personnel are properly trained and briefed as to the relevant law, that rules of engagement[107] are legally accurate and clear and that all armed forces remain disciplined at all times.

The 'spotlight' that personal and mass media reporting, litigation and inquiries shed on the conduct of conflict will also have another effect. States will increasingly be driven, willingly or otherwise, to explain the actions they have taken and

[107] For a discussion of rules of engagement, see Solis 2011, pp. 490–512. "The need to provide a regulatory framework for the conduct of all military operations based on the law of armed conflict principles is recognized as essential to disciplined and effective operations"; Corn et al. 2012, pp. 128–129.

the reasons for doing so. Such explanations, whether given by a commander during a media interview or in evidence to a court or inquiry, will serve to clarify state practice and opinion juris on the point. It will be interesting to see to what extent this will have the effect of advancing, and clarifying, customary law understanding.

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Chapter 12
Bringing the Strands Together

Contents

12.1 The Issues

In this chapter, we try to bring together the strands of the discussion that we have conducted in the earlier chapters, and attempt to draw some conclusions. We try to show where the challenges in the field of conflict law seem to lie and to put forward, where possible, some suggested approaches to these. The core questions we seek to address are whether relevant law will regulate future conflict and whether, by being relevant, it will be adhered to and enforced.

Before we do this, however, it is instructive to consider how the UK armed forces interpret the roles that they will be required to fulfil in the context of foreseeable conflict. The UK Ministry of Defence Strategic Trends identified a number of themes that we listed in Sect. 6.6. From the air and space perspective, the most recent and authoritative UK conceptual publication on the subject continues to see two main operating tasks for UK armed forces in the air and space environments, namely protecting the UK and its dependent overseas territories from attack and providing the most rapid and responsive means of projecting

W. H. Boothby, *Conflict Law*, DOI: 10.1007/978-94-6265-002-2_12,

power to secure UK's national interests globally, directly from the homeland or as part of an expeditionary operation.[1] In the land environment, the Future Land Operating Concept notes that the "land force must maintain a credible, and demonstrable, persistent capacity to defeat adaptive, hybrid adversaries; predominantly amongst the population on ground and with methods of their choosing, and have the capability to secure resources and people".[2] The Future Maritime Operating Concept identifies two main themes out to 2025, namely complexity in the littoral environment and increased oceanic competition triggered by increased accessibility and resource pressure.[3]

The ICRC identifies the long duration of contemporary armed conflicts as a major theme, citing as examples among others the conflicts in Afghanistan, Colombia, Philippines and Somalia and noting that after ceasefires and peace agreements, hostilities often flare up again between the same parties.[4] Pascal Vennesson, however, observes that between 1989 and 2009 the number of major armed conflicts declined significantly;

> [i]nterstate wars and civil wars have been lower in number across the period and, despite their brutality, these conflicts have killed fewer people compared with major conventional wars. The wars of these twenty years were predominantly low-intensity conflicts, usually taking place in the developing world and involving relatively small, ill-trained, lightly armed forces that avoided major military engagements but frequently targeted civilians.[5]

There seems little doubt that there will be some, probably numerous, wars in the future that will fit neatly within the established legal framework discussed in Chap. 2. However, one rather suspects that the messy mix that we have seen between criminal activity and other forms of violence in Colombia, Mexico and Afghanistan[6] will also feature perhaps more frequently in the future, raising a number of ambiguities as to the law that is to be applied to specific events or parts of the conflict. Increased sophistication and the drive for improved efficiency and effectiveness in developed states

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[1] UK Future Air and Space Operating Concept, JCN 3/12, issued by UK Ministry of Defence DCDC, on 5 September 2012 (JCN 3/12), at para 107. Achieving this requirement out to 2035 will require an integrated air defence system capable of countering conventional and less than conventional air and space threats, including electro-magnetic pulse weapons, micro- and nano-unmanned air systems, and threats to UK access to air and space through cyber or electronic attack; ibid., para 109.

[2] UK MOD Future Land Operating Concept, JCN 2/12, May 2012, p. vi.

[3] UK MOD Future Maritime Operating Concept, FMOC 2007 dated 13 November 2007, para 110.

[4] ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, at p. 6.

[5] Vennesson 2011, p. 241.

[6] Haines 2012, p. 25.

> will encourage (if not require) the exploitation and integration of joint assets, multi-agency initiatives and cooperative solutions in response to crises. Critically, crisis management, it is predicted, may become more subtle and dynamic with some developed nations' governments opting for non-military levers to deal with the causes of problems while retaining the military option to address more threatening symptoms.[7]

In short, the future will contain all of the things we know from the past, supplemented by one or two things we do not know and cannot predict. The future will therefore be uncertain, it will probably be more complex and more difficult than in the past and the level of legal ambiguity seems destined to increase.

12.2 Discussion of the Issues

In this section, we develop and reflect on some of the themes that have underpinned the discussion in the book. Do the challenges that we have been addressing really put respect for the core principle of distinction at risk, and if they do, how should western states respond? Will the controversies associated with the relationship between international humanitarian law and human rights law prejudice respect for, and adherence to, the law as a whole? If states are central to the formation of international law, shouldn't a Diplomatic Conference be convened to address all of the perceived gaps in international humanitarian law that we have identified? If such a process is, for whatever reason, impractical or undesirable, is there anything else states can do? How effectively are states enforcing the law of armed conflict? The answers to these questions will help to determine the nature of the law that will regulate future conflict, whether it will be relevant, and whether it will be enforced, adhered to and thus effective.

12.2.1 Respect for the Distinction Principle

In Sect. 6.3.4 we saw that one strand of effects-based thinking may challenge the generally accepted confines of the military objective definition, thus calling into question a vital prop of the principle of distinction.[8] Some but by no means all who adhere to the 'war sustaining' approach to the military objective definition would also potentially put that cornerstone principle in jeopardy. The extensive use of cyber deception operations could, as we saw in Chap. 4, make it very difficult for a state to apply the principle effectively and we too frequently hear of civilian

[7] Future Maritime Operational Concept, n. 3 para 117. The Future Land Operating Concept, n. 2 above, talks of increased global complexity, rapid movement of ideas, capital, people and information and the spread of networks and microstructures with global reach; para 102.

[8] For a discussion of the principle of distinction, and of the related principles of military necessity and of proportionality, see Solis 2011, pp. 250–286.

suicide bombers detonating their devices in civilian areas with the apparently deliberate purpose of maximizing civilian loss of life. Moreover, Eric Jensen suggests that the changing nature of participants in armed conflicts should cause us to re-examine the applicability of the current law of armed conflict paradigm. He believes that the differentiation between fighters and non-fighters will become even more blurred as global technologies allow new kinds of linkages and associations among people.[9] The result, he argues, is that the focus will shift from targeting decisions based on status to an approach based on conduct; "[t]he inability to meaningfully differentiate between actors on the battlefield will have a detrimental effect on the bedrock principle of distinction".[10]

Western states, troubled by fiscal challenges, seek economies in defence budgets through substituting cheaper civilian employees for more expensive armed forces personnel. State communications, security, monitoring and related activities, often undertaken by civilians in peacetime, involve skills that are likely to be required during warfare and frequently involve tasks that, in wartime, would amount to direct participation in the hostilities.[11] Many States will have neither the resources nor the capacity to train and maintain substitute personnel to enable the relevant roles to be fulfilled by members of the armed forces in times of armed conflict. Assuming that there are no plans for such individuals to become members of the armed forces should armed conflict break out, the inference is that certain states are actually planning to use civilians to undertake tasks that in armed conflict amount to direct participation in the hostilities.

These and other trends[12] suggest that future war will see civilians more closely involved in hostilities on behalf of western states against an enemy that pays scant regard to the obligations in Articles 48–67 of API. Arguably, this is not a satisfactory global approach to the cardinal, 'intransgressible' principle of distinction. Western states should plan for meticulous compliance in all future operations with the letter and spirit of the distinction principle. While the need to achieve budgetary savings may be pressing, while new technologies may be conveniently operated by civilians and while adverse parties may operate as if the principle did not exist, western states should do everything possible to comply with and preserve the principle and to ensure respect for it, representing as it does a critical value judgment that defines the western democratic ethical approach to armed conflict.

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[9] Jensen 2013, pp. 14 and 15. Specifically Eric Jensen argues that the increasing conflation of fighters and civilians will devalue the legal distinctions between combatants and civilians.

[10] Jensen 2013, p. 15.

[11] An example of this tendency would be the increasing use by the US of civilians to undertake attacks using unmanned platforms; see Cloud 2011, available at www.latimes.com/news/nationworld/world/la-fg-drones-civilians-20111230,0,6127185.story.

[12] Consider that during the 1999 Kosovo campaign "the President of the United States, the prime minister of Great Britain, the President of France and the president of Germany" were reportedly involved in targeting decisions; Short 2002, p. 23. See also *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment dated 24 March 2000 at para 76 and *Prosecutor v. Delalic* et al., Case No. IT-96-21-A, Judgment dated 20 February 2001, para 197.

That would imply that states should only employ their armed forces directly in the fight and in activities directly associated with it, relegating civilians to tasks that do not constitute direct participation. Employing civilians in roles that have traditionally been the preserve of members of the armed forces does not, at law, render those activities immune from attack.

Having also reached the conclusion that states have the prime responsibility to ensure compliance with international humanitarian law, Daniel Thürer asks "[s]hould not economic actors, whether they are private military companies, arms producers, corporations exploiting natural resources or diamond buyers have responsibilities under international law in general, and under international humanitarian law in particular?" Essentially the question that is being raised is whether we should hold these companies accountable under international law for the unacceptable consequences of their actions.

The wish to widen enforcement of international law against all those who seek to breach it, including against the individuals who actually perpetrate such breaches and against the corporations, organized and less than organized armed groups that are involved, perhaps in a secondary capacity, is to be applauded. The author would also support a development of the law that recognizes the criminality of firms, groups and individuals that aid, abet, counsel or procure the commission of international law breaches, or that are jointly involved, as conspirators or otherwise, in unlawful activity. At the criminal level, amendment of the ICC Statute might be an option, for example, to enable the court's jurisdiction to be exercised against groups and corporations. There are, however, serious difficulties that would need to be overcome. Which officials of a company need to have acted in order to enable their act to be imputed to the company. Which company officials must have a specified *mens rea* for that *mens rea* to be imputed to the company. Who decides which persons speak, act or think for an organized armed group? What punitive options should be available in respect, specifically, of corporate and group convictions?

Where compensatory liability is concerned, the author sees even more practical difficulty. If the right of individuals to seek compensation or restitution under Article 3 of Hague Convention IV of 1907 and under Article 91 of API is controversial, holding individuals, groups or firms liable to compensate is likely to be even more difficult to achieve. Nevertheless if, as seems to be the case, groups and companies are going to be increasingly involved in armed conflict, practical measures for holding them accountable for crimes they commit or assist and rendering them liable to compensate those whom they wrong, directly or indirectly, are clearly desirable next steps. The development of such measures will, in the author's view, require time and thought but should, along with facilitating individual claims against states, be a priority.[13]

Gradual erosion of the differences between armed forces personnel and civilians puts the civilian population at enhanced risk in future conflicts. Perhaps, this

[13] See Thürer 2011, pp. 286–287.

approach is considered by some to be excessively traditionalist. However, the fact remains that anything that erodes respect for the distinction principle is liable to lead to unlimited, uncontrolled and potentially unstoppable warfare in which atrocity is piled on atrocity and in which merciless slaughter becomes the rule. There is an inescapable audit trail from Article 35(1) of API to Article 48, from Article 48 to Articles 41, 51 and 52, and from Articles 41, 51 and 52 to Articles 57 and 58. Allowing any of the links in that chain to be broken or impaired will have the most dire consequences and would be, it is suggested, irresponsible and unacceptable.[14]

12.2.2 Human Rights Law and Gaps in the Law of Armed Conflict

While this is going on, there is an ongoing controversy of the utmost importance as to the relationship between the law of armed conflict and human rights law in their respective application to activities undertaken pursuant to an armed conflict. The very fact of the controversy demonstrates the practical difficulty commanders have. If the 'specific rules in specific circumstances' approach is to be adopted, commanders will be unable to issue clear orders in advance of military action as the circumstances that will determine which body of law is to apply will not, by definition, by then be known. This caused us in Chaps. 9 and 10 to consider the possibility of dividing the conduct of armed conflict into different classes of activity, such as combat, requisitioning, detention and so on, with a view to determining which body of law would apply to each. Whether the outcome of that exercise was satisfactory is for the reader to judge.

The problems we are having here seem to stem from the prevailing preference for convergence between the two bodies of law[15] and from the primacy, discussed in Chaps. 9 and 10, that certain decisions of the international courts seem to give to human rights law during periods of armed conflict.[16] The proper application of the

[14] Daniel Thürer sees concepts of human security and human consciousness as two relatively new perceptions that offer promise for further development in international humanitarian law. He argues that it is individuals whom international humanitarian law protects and it is individuals who must therefore take up its cause and try to protect it. He therefore proposes opening up international legal institutions and procedures and making them more flexible to allow broader participation. He also suggests that international lawyers, politicians and others need to be more in tune with public concerns; Thürer 2011, pp. 119–120.

[15] Discussed and analysed, for example, in Modirzadeh 2010, 349.

[16] It is a matter of individual appreciation whether a situation in which a right must be interpreted by reference to a body of law places the right or the body of law in a position of primacy.

lex specialis principle,[17] at least to the extent of according precedence to law of armed conflict norms where that law makes specific provision as to the particular situation, would improve matters somewhat and we discussed in Chap. 10 how that might be made to work. Clearly, it would be entirely impractical to apply human rights law norms to the conduct of armed conflict hostilities, and decisions of regional courts that purport to do so would seem to be misguided.[18] Similarly, we concluded that the more that a decision, activity or situation during a period of armed conflict has in common with the peacetime relationship between the citizen and the state, whether because of the remoteness of the location of the activity or decision from, and its lack of connection with, combat or because of some other circumstance, the more appropriate it is, absent particular considerations, that human rights law norms be applied.

There are dangers implicit in this situation of uncertainty and controversy. If the law, taken as a whole, is perceived by those charged with upholding it as being confused, illogical and/or impractical, there is a risk that it will be ignored to the detriment of victims. While semantic debate both in and out of court and university is all very well, in warfare practical realism on a sure legal base is what is required, because the law belongs to the soldiers, sailors and airmen, not, it is suggested, to the academics.

12.2.3 The Nature of International Law and the State of the Law of Armed Conflict

This discussion, however, raises more fundamental legal sub-issues about the nature of international law and about the current state of the law of armed conflict. As to the first of these sub-issues, the nature of the law, it is clear that the law is

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[17] See Dinstein 2010, pp. 23–26. In *Prosecutor v. Kunarac* the ICTY Trial Chamber opined that "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law"; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, judgment dated 22 February 2001. Yoram Dinstein asserts that, in the event of an international armed conflict, the law of armed conflict norms prevail as *lex specialis* over the *lex generalis* of human rights. He points out that in some respects the law of armed conflict provides greater protection than human rights law, for example in API, Article 11 and observes that there may be benefit for some victims from the continued application of non-derogable or non-derogated human rights. Cited examples are the summary execution by an army of its own deserters and the possibly greater availability of remedies such as compensation under human rights law arrangements; Dinstein 2010.

[18] As Ken Watkin has aptly commented, "[i]n practical terms, a human rights supervisory framework works to limit the development and use of a shoot-to-kill policy, whereas international humanitarian law is directed toward controlling how such a policy is implemented"; Watkin 2004, p. 1 at p. 32. This is the divide in the philosophical underpinnings of the two bodies of law that lies at the root of the difficulty that practitioners experience in reconciling their points of difference.

what states formally agree and what they do or refrain from doing pursuant to perceived legal obligation. Acts that clearly breach established legal norms, such as the deliberate targeting of civilians, do not challenge the legal norm. They are, rather, quite simply breaches by the relevant state, group or individual of widely accepted international law obligations and the crimes committed by the relevant individuals require investigation, trial and punishment.

Employing civilians in activities that amount to direct participation in hostilities does not, as such, constitute a breach of international law. It deprives those civilians of certain protections, for example, rendering them lawful targets and depriving them of combatant immunity on capture, but no rule of law is actually broken.[19] The fact that states are increasingly prepared to employ civilians in combat-related tasks does not suggest that states are by their conduct implicitly questioning the continued validity of the direct participation rule or of the distinction principle. Rather, it means that in circumstances of financial stringency, states are prepared to allow those civilians to be exposed to the stated dangers and that states are, it is suggested inadvisedly, prepared to take the risks with the principle of distinction discussed in Sect. 12.2.1.

As to the second sub-issue, the current state of the law, the failure of states since 1977 to update the conventional law of armed conflict as it applies to the conduct of hostilities[20] might cause some to argue about its continued relevance. The absence of specific treaty provision in relation to cyber warfare, warfare in outer space and air to air combat, the somewhat dated arrangements for detained persons and the less than complete provision for non-international armed conflicts tends to reinforce arguments that the law of armed conflict is not always as up to date as it should be and requires some international action to rectify that situation. In an ideal world, an international diplomatic conference similar to that which took place from 1974 to 1977 would be convened and would address the perceived gaps in legal provision in a manner consistent with existing legal arrangements.

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[19] Consider *ex parte* Quirin et al. 1942, 30–31. Having drawn a distinction between lawful and unlawful combatants, Chief Justice Stone opined: "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." See also Dinstein 2007, pp. 152–153. Hans-Joachim Heintze comments, however, that the "status of 'unlawful combatant' is unacceptable" because such an individual would be "placed outside the regime of international humanitarian law, and hence be unprotected by that body of law. The correct position is that if a person is not a combatant in the sense of the Geneva Conventions, then he/she is a civilian subject to international criminal law and entitled to the protection of international human rights law"; Heintze 2007, p. 167. It is of course correct to say that such individuals are subject to international criminal law, but perhaps more relevantly they are, by virtue of their lack of combatant immunity, also subject to domestic criminal law. The applicability of international human rights law is discussed in Chaps. 8, 9 and 10.

[20] As to the inadequacy of the law as it applies to armed groups in non-international armed conflicts (NIACs), see generally Sassoli 2010.

Arguably, customary law has developed and fills the identified gaps.[21] Indeed, the ICRC Customary Law study and the International Manuals to which we referred in Chap. 3 do rather support that view. The detail of some customary law rules may, however, be a matter of debate and of national appreciation, as discussion of the ICRC Customary Law Study[22] report has demonstrated. The problem with the International Manuals, the Interpretive Guidance[23] and the ICRC Customary Law Study[24] is that they are not law in their own right. While they, in the author's view, come within Article 38(1)(d) of the ICJ Statute as "teachings of the most highly qualified publicists of the various nations" and thus as "subsidiary means for the determination of rules of law", states may nevertheless choose to accept or reject the accuracy of the Rules and Commentaries in them.[25] While ideally states would now come together and agree more comprehensive and up to date conventional law in order to put the legal position on numerous matters of important contemporary controversy beyond doubt, there is a clear risk that such a process may open Pandora's box and result in much less rather than more satisfactory law of armed conflict provision than we currently have. As a result, there are those who suggest that customary international law methodology may have to be employed even if there is continuing disagreement as to what that methodology entails.[26]

As Gary Solis succinctly puts it, "[a]ny state considering unilateral changes to [the law of armed conflict], or to the Geneva Conventions, would do well to remember the principle of unintended consequences".[27] Similar considerations potentially apply to proposals for multi-lateral discussions of changes in the law. In the current environment, it is probably wiser to safeguard and enforce the law that we have and to demonstrate its applicability and relevance to the new means and methods of warfare that have been discussed in this book. Indeed, one of the very useful contributions that International Manuals, the ICRC Study[28] and the Interpretive Guidance discussed in Chap. 3 can have is in setting out expert opinion on which norms of the law of armed conflict apply to those new

[21] Customary law has certainly "developed to govern internal strife"; *Tadic* Jurisdiction, para 127. See the comments of Christopher Greenwood as to the influence of the *Tadic* judgment on the decision to adopt far-reaching provisions on war crimes in NIAC in the Rome Statute of the International Criminal Court; Greenwood 2008, pp. 56–57. The consequence is that the "dichotomy between international and non-international armed conflicts is much less significant today"; Akande 2012, p. 35. The challenge, however, lies in identifying with precision the content of customary law rules; Corn et al. 2012, p. 56.

[22] Henckaerts and Doswald-Beck 2005.

[23] Melzer 2009.

[24] Henckaerts and Doswald-Beck 2005.

[25] In this regard it should be recalled that States may deliberately have failed to address particular points in explicit law; consider for example Watts 2012, p. 165.

[26] Lavoyer 2006, p. 302, Murphy 2012, p. 25 and Dinstein 2010, p. 296.

[27] Solis 2011, p. 107.

[28] Henckaerts and Doswald-Beck 2005.

circumstances and in explaining how, in the opinion of the experts, they apply. The author therefore concludes that future effort towards the development of the law should be focused on initiatives that will not put established legal norms at any kind of risk.

Nevertheless, Yoram Dinstein's view is that

> [t]he need to hammer out either formal or informal agreement with respect to those elements that are missing from – or are insufficiently forged in – the present layout of [the law of international armed conflict] must be viewed as the greatest challenge at the present time. International law must march in lockstep with the compelling demands of reality.[29]

Clearly, the law must indeed develop so as to satisfy future needs.[30] So the challenge is to find a way of achieving such development while safeguarding the protective norms that we have.

In the law of weaponry, *ad hoc* initiatives have led to the adoption of new treaty law on anti-personnel landmines and cluster munitions in circumstances where it was not possible to achieve treaty consensus under the auspices of the Conventional Weapons Convention.[31] States that had the affected weapons in their inventory have been inspired by such initiatives either to renounce their use or to accelerate the withdrawal of such weapons from service.[32] There is always, one supposes, the possibility that a like-minded group of states could agree treaty provision on some of the matters that we have been discussing with a view to encouraging other states to participate in the resulting treaty in due course. Perhaps by carefully restricting the states that are invited to participate in the negotiation, the risk that the resulting legal provision is less satisfactory than the law we currently have can be averted or limited. Whether states would be inclined to adopt the resulting legal rules would likely depend on their content, their practical realism and specifically on whether states consider that the rules set forth in the new treaty are consistent with the ability of states and their armed forces to conduct effective military operations against foreseeable threats. Each state would be likely to review the adopted text and to reach its own decision, but then states do that anyway when deciding whether to

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[29] Dinstein 2010, p. 297.

[30] Pfanner 2005, 149; the law must develop, either on the international or the domestic plane and in the form of legally binding rules or general codes of conduct.

[31] Boothby 2009, pp. 181–182 and 259–261. At the conclusion of a diplomatic conference convened for the explicit purpose of negotiating a ban on anti-personnel landmines and which took place in Oslo from 1 to 18 September 1997, the text of the Ottawa Convention was adopted. Similarly, after a series of conferences to discuss a prohibition on the use of cluster munitions, the text of the Cluster Munitions Convention was adopted at a conference in Dublin that took place from 19 to 30 May 2008. Marco Sassoli, Antoine Bouvier and Anne Quintin see these processes as a response to the effect of the traditional, consensus-based approach which "ends up conferring a 'triple victory' on those who have been described as 'digging the grave of International Humanitarian Law', i.e. those who do not want better protection to exist in a given domain"; Sassoli et al. 2011, p. 150.

[32] See the statement to the UK Parliament made by the Secretary of State for Defence, Mr. Browne, on 20 March 2007 at Hansard, 36WS and 37WS committing UK to withdraw cluster munitions with immediate effect.

ratify treaties that they negotiated. The danger is that such a process, if conducted with inadequate representation by specially affected states, risks producing a treaty text that will be largely ignored by those states whose participation is necessary if practical progress is to be achieved.

12.2.4 If New Treaty Law is Not Feasible, What Can States Do?

If, as seems likely, states do not seek to update the law by means of multi-lateral negotiation, for example, because a treaty negotiation is considered to be impractical, undesirable or simply too risky, are there other processes that can usefully be adopted to address the gaps in the law that we have identified? One appropriate line of further work would be the writing of additional International Manuals or the development of other soft law instruments to cover some of the areas that we have been considering, in particular the law of warfare in outer space and, perhaps, by updating and expanding on the International Institute of Humanitarian Law text[33] on the law relating to non-international armed conflicts. The resulting instrument(s), taken with the San Remo, AMW Manual and Tallinn Manual, might then be used by states as a basis for taking the law forward. States could, for example, overtly declare their positions by reference to the black letter rules set forth in such documents, accepting, qualifying or rejecting each rule or assertion of law as appropriate. Alternatively, states could adopt the language of the relevant document when preparing their own Military Manuals or other national statements of the law. The state practice resulting from either approach would at least be a helpful further indicator of the direction of travel of customary law in relation to the relevant activities.

There are, however, other steps that states could take with a view to reinforcing and developing the law of armed conflict. During appropriate litigation before international courts, official statements by states, whether as parties to the relevant proceedings or on an intervening basis, asserting their view as to the application of the law of armed conflict, would be potentially useful in this regard. If a court decision is made that a state believes misapplies the law, again there would be nothing to prevent and indeed everything to suggest that a state involved in the proceedings, or indeed other states, could make formal unilateral statements outside the proceedings asserting the relevant state's view.

At this point, we should recall that the Statute of the ICJ stipulates a list of sources of international law which, though not perhaps complete,[34] does

[33] The Manual on the Law of Non-International Armed Conflict with Commentary, International Institute of Humanitarian Law, San Remo, March 2006.

[34] Greenwood 2008, para 7, available at http://untreaty.un.org/cod/avl/pdf/ls/greenwood_outline.pdf.

nevertheless refer to decisions of international courts. Christopher Greenwood makes the point that the reference in Article 38(1)(d) to the status of such decisions as a 'subsidiary' means for the determination of a rule of law should not be misinterpreted as indicating lack of importance, and it is clear from his remarks that such decisions are authoritative evidence of international law on most topics.[35] Shane Darcy agrees that "[j]udicial decisions are often treated as if they themselves are a source of law" noting that human rights protection under the European Convention is an example of where the Convention and the jurisprudence of the European Court must be considered together and that judgments of the *ad hoc* international criminal tribunals are often cited as a source of law. Moreover, international courts often act as if their own decisions are binding.[36]

As to hierarchy, and subject to the limited class of rules that have *jus cogens* status, Christopher Greenwood's view is that there is "no strict sense of hierarchy between treaty and customary law".[37] So, let us imagine a situation in which practice of states conflicts with an international court's decision. It would seem that if that practice, accompanied by *opinio juris*, were so extensive and convincing, so general as to form a customary rule, that customary rule would take priority over the court decision. Practice of states that lacks the generality to form a customary rule but that nevertheless conflicts with the decision of an international court may of course amount to breaches of the rule of international law that the court's decision reflects. Shane Darcy, however, rightly comments that, "[i]n terms of developing international law, the key […] is how states, the traditional architects of international law, and other relevant bodies react to such judicial decisions",[38] a comment that tends to support the view that states should be more prepared to make their views as to the decisions of international courts publically known.

Daniel Thürer draws attention to the *amicus curiae* provision in Article 36(2) of the European Convention as a mechanism for the International Committee of the Red Cross, NGOs or indeed states uninvolved in particular proceedings to comment at the invitation of the President of the Court.[39] So, Article 36(2) may represent a way in which states can express their national position on a matter that is germane to the Court's deliberations. Of course, formal statements and practice by states that conflict with the propositions of law on which the ultimate decision of the Court is based may call into question the status of those propositions as reflective of law.

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[35] Greenwood 2008, para 5.

[36] Darcy 2010, pp. 334–335. Shane Darcy argues persuasively that judicial development of international humanitarian law by the international criminal tribunals has served to progress this body of law and to bridge noticeable gaps, although such a process needs to be treated with a degree of caution; Darcy 2010, p. 335.

[37] Greenwood 2008, para 8.

[38] Darcy 2010, p. 335.

[39] Thürer 2011, pp. 159–160.

Another step that states might usefully consider is that proposed in the recent past by Elizabeth Wilmshurst and by Sir Daniel Bethlehem. Elizabeth Wilmshurst discusses the feasibility of unilateral commitments by states participating in hostilities as to the law that they will apply, and then raises the possibility of similar unilateral declarations by non-state armed groups pledging compliance with the principles and rules referred to in the declaration.[40] Building on those thoughts, Sir Daniel Bethlehem notes the steps that have been taken so far to seek to fill the gaps in legal provision in relation to non-international armed conflict by articulating principles of customary law that would apply to both international and non-international armed conflict, by adopting and applying rules of international armed conflict in non-international armed conflict situations as a matter of discretion or by analogy or by looking to rules of international human rights law. He then suggests:

> There would be merit in States making unilateral declarations of a more general character, away from any issue of application in a particular conflict, that they will henceforth apply the law relevant to international armed conflicts in all situations of armed conflict, whatever their character, save insofar as may be modulated in the unilateral declaration itself to take account of objective distinctions of a practical nature between conflicts of an international and a non-international character.[41]

Semantically, it would be a matter of debate whether a unilateral declaration made by a state under such arrangements would be a source of international law as such. Rather, one suspects that it would constitute a piece of state practice. If the Declaration, or the circumstances of its making, indicate *opinio juris*, such a declaration would contribute to the possible formation of customary rules. There would, however, seem to be no reason to limit such a Unilateral Declaration process to the development of the law relating to non-international armed conflicts. The Declaration made by certain states under the auspices of the Conventional Weapons Convention in relation to Mines other than Anti-Personnel Mines in 2006[42] demonstrates that such Declarations might address wider matters of international law. If made by enough states and if the practice they reflect becomes sufficiently uniform and convincing, sufficiently general, such a Declaration is capable of initiating a process leading to a rule of law binding on all states. For that matter, if a group of like-minded states feel able to make Declarations in similar terms, there may come a time when they record the Declarations, perhaps supplemented by additional refinements, into treaty form to which additional states can become party.

Sandesh Sivakumaran, at the conclusion of his comprehensive analysis of the law relating to non-international armed conflict, proposes a new instrument designed to bind armed groups in all situations, or a treaty that is open to states and to armed groups alike, but with representatives of armed groups being involved in

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[40] See Wilmshurst 2012, pp. 501–502.

[41] Bethlehem 2012, p. vii.

[42] CCW/CONF.III/WP.16, dated 16 November 2006.

the drafting process.[43] Implementation, dissemination, monitoring and enforcement of the provisions of such an instrument would be vital. It could take the form of a treaty, a hybrid treaty, an agreement subject to international law or something different. The important point, however, is that it could include reference to some of the creative alternatives to combatant immunity discussed in Chap. 2. While not all armed groups would participate, and while some that do participate would breach the obligations to which they agreed, "a mechanism that separates out those armed groups that take their obligations seriously from those that do not, and one that differentiates between those groups that claim to respect the law of non-international armed conflict and those that actually do so, would be an accomplishment in and of itself".[44]

Gerd Hankel predicts that 'conservative international lawyers' will receive such proposals with a degree of scepticism,[45] a scepticism that is, one might suggest, likely to be shared by states in general. States are likely to prove hesitant about accepting participation of armed group representatives in any instrument or treaty negotiation process. Limiting such participation to a few armed groups that demonstrably take their obligations under international law seriously might help to overcome some such hesitancy. However, states are likely to take the line that individuals and groups that perpetrate terrorist acts are criminals with whom negotiation is improper or inappropriate or both, and there seems little justification for expecting states to change that view.

Konstantinos Magliveras bases his analysis on five assumptions, namely that acts of international terrorism organized and perpetrated by non-state actors against states and the reactions of those states are a form of warfare to which international humanitarian law must always apply; that the perpetrators operate within transnational groups acting as entities akin to political organizations with terrorist acts being committed in states other than their own; that no judgment is made as to the moral or legal acceptability of the acts or as to whether they promote perceived political goals; that state sponsored terrorism is excluded; and that it is irrelevant who is financing, recruiting, assisting etc. these groups. He argues that identified gaps in international law should be dealt with either by amending API or by negotiating a self-standing multi-lateral instrument,[46] but that approach would involve the risks referred to earlier in this section.

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[43] Konstantinos Magliveras suggests that there is a need to devise new rules or to revise and complete the existing ones, and that non-state actors of the terrorist type should be involved, participating on an equal footing with traditional actors such as states, contributing to the drafting and being given the opportunity to sign the final instruments; Magliveras 2010, p. 339. Acknowledging that such a proposal is liable to be regarded as preposterous, Magliveras contends that the reality of involvement of such groups in armed conflict and the irrationality of expecting such groups to adhere to rules they are not involved in negotiating support their suggested involvement in negotiating new rules.

[44] Sivakumaran 2012, p. 567.

[45] Hankel 2010, p. 358.

[46] Magliveras 2010, pp. 340–355.

These paragraphs seem to show that if the 'gold-plated' solution of full diplomatic conferences to address all perceived inadequacies of the law of armed conflict in a series of processes, or even in a single process, is neither appropriate nor achievable,[47] less ambitious options might and indeed should be considered. Perhaps Daniel Thürer is right that general principles of law, which are regarded as a basis of a civilized society, should be given more consideration as a basis also of international humanitarian law. He ties this to the school of thought that tries to interpret basic principles of international law as it would the constitution of a state, contending that the common interests of the international community and the search for globally shared values of humanity determine the direction to be taken by the law. International humanitarian law would, he proposes, form one of the cores of such a 'constitutional' order, revealing, as it does, the irreducible essence of the law.[48]

At the conceptual level, there is much to commend such an approach. At the practical level, the issue is how such high-minded principles are to be translated into rules that the soldier, sailor and airman can understand and apply to the new features of warfare when states, as has been discussed, are for whatever reason unlikely formally to agree ad hoc updating rules. This, as suggested earlier in this subsection, is perhaps where the International Manuals discussed in Chap. 3 have particular value as a way of showing how the core principles of law can be applied in the new circumstances. This is also where international courts are of great importance in demonstrating through their judgments how the general principles of law should be applied to the particular circumstances that are being litigated. To talk of international legislative, executive and judicial branches in a quasi-constitutional sense would probably be inaccurate and wrong. To suggest that the Martens Clause provides an additional legal criterion for assessing the legitimacy of means or methods of warfare is also incorrect. To argue, however, that the international community regards certain principles and norms as essential elements of international law in general, and that those principles and rules must be applied generally by all those involved in armed conflicts is absolutely correct. Articulating those rules, disseminating and implementing them, training in them, and enforcing compliance with them therefore become critically important activities.[49]

[47] Wilmshurst 2012, p. 502, footnote 131.

[48] Thürer 2011, pp. 406–418.

[49] Indeed, Marco Sassoli, Antoine Bouvier and Anne Quintin note the gap between the well-elaborated yet still developing codified fabric of IHL and recent and contemporary practice of those who fight in such places as the Great Lakes Region, Chechnya, Afghanistan, Sudan the Philippines, Israel and the Palestinian Territories and in Iraq; see Sassoli et al. 2011, p. 34. Herein lies the importance of dissemination and enforcement.

12.2.5 Crime in Warfare and Enforcement of the Law

In the context of the discussions of asymmetric warfare, of effects-based warfare and, in a sense, of the civilianization of the battlespace, we have touched on the question of criminality in warfare. Furthermore, we have specifically considered whether 'criminal warfare' as a notion in the doctrinal literature also has implications for the law of armed conflict. Certainly, there are those who would entirely exclude from the notion of armed conflict armed hostilities that are motivated, for example, by the quest for personal enrichment. They contend that only if the conflict has a political purpose should the law of armed conflict be applicable to it.[50] However, as we noted in Chap. 2, widespread criminality is often associated with conflicts that all observers would agree come within the existing law of armed conflict lexicon. Drawing a dividing line between conflicts that are entirely manifestations of organized crime and those which are conventional armed conflicts with clearly political objectives but which are pursued more or less in a criminal manner would not be easy, and would probably involve too much subjectivity, for example, as to objectives, for it to constitute a satisfactory basis to differentiate between the application of contrasting legal regimes.[51] Here again, however, it seems likely that states would tend to characterize armed activities associated with criminal enterprises as fundamentally to be addressed in accordance with the criminal law paradigm, although as noted in Chap. 2, the application of the law of armed conflict regime would afford states a greater range of options which may be useful if the 'criminal conflict' achieves a high intensity.

There are, however, some important further questions to be posed and answered within the current section. Do the trends or tendencies referred to in the present volume challenge the law of armed conflict? The answer seems, on balance, to be that they do not. The principle that in armed conflict the law limits what can legitimately be done, for instance when injuring the enemy, is universally accepted

[50] "War is not merely violence for its own sake or for a purpose that is not political"; Haines 2012, p. 10 and 11 where it is noted that whereas political war will be pursued until the political ends are achieved, those undertaking criminal war may actually seek to prolong it rather than bring it to a successful conclusion.

[51] The ICRC takes the view that the motivation of organized armed groups involved in armed violence is not a criterion for determining the existence of an armed conflict; ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report to the 31st International Conference of the Red Cross and Red Crescent (2011) at p. 11. Haines acknowledges this assessment but considers that regarding actions of criminal gangs as those of an organized armed group and thus characterizing the violent circumstances as an armed conflict is not uncontroversial; Haines 2012, p. 26. Note the reference in UNSCR 1851/2008 in the context of anti-piracy operations to international humanitarian law and Dapo Akande's view that the use of force against pirates may rise to a level where it amounts to or is part of an armed conflict; Akande 2012, p. 52 citing, inter alia, Passman 2008, p. 1. As Akande acknowledges, however, other commentators suggest that there is no need to have recourse to the law of war in relation to the fight against piracy.

and cannot be questioned.[52] The law of armed conflict sets the requisite limits. States from all cultural, racial, ethnic and religious traditions have made and accepted the core principles and rules of the law of armed conflict, and states and individuals[53] that act inconsistently with them are rightly and widely condemned. There is no basis for suggesting that the new developments in the conduct of armed conflict discussed in Chaps. 4–7 alter that position. As we have noted, for example, all new weapons, weapons technologies, means and methods of warfare must be judged by reference to the existing body of international law, and those that do not comply must not be implemented. In addition, customary law requires that all states undertake this evaluation process.

Moreover, while lack of respect for the law may be a feature of some modern warfare, enforcement of the law is also more prevalent now than when the author first lectured on these matters in the early 1980s. In Chap. 11, we discussed the jurisdictions of the International Criminal Court, of the ad hoc tribunals, e.g. for the Former Yugoslavia and for Rwanda and of domestic civilian and military courts.[54] The articulation by states of their declared position on all relevant international law issues in military manuals,[55] the employment of such manuals as a basis for training military personnel in the law of armed conflict,[56] the allocation of legal advisers to commanders at appropriate levels of command,[57] the passing into a state's domestic law of disciplinary codes for the regulation of the armed forces[58] and military training that promotes and enhances their discipline are all important ways of seeking to ensure that in times of armed conflict international law rules will be understood and applied. So, not only are states at the centre of formation of international law; they are also critical to its practical implementation and enforcement.

Moreover, the guilty are increasingly brought to account. The death of Muammar Gaddafi appears to have been an example of summary execution[59] which is

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[52] See Hague Regulations 1907 Article 22 and API Article 35(1).

[53] Indeed, that general acceptance of the relevant propositions by states as law is central to their status as customary law principles and rules, and treaty rules only bind to the extent of their acceptance by states.

[54] See Chap. 11.

[55] Consider for example the UK Manual (2004) and the German Manual, Joint Service Regulations (ZDv) 15/2 dated August 1992, published with a commentary at Fleck 1999. A US Joint Service Manual is believed to be in preparation and its publication is awaited.

[56] Consider evidence as to UK military training in the law of armed conflict dated 11 January 2010 given by Charles Barnett before the Baha Mousa Public Inquiry and available at www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_290410/bmi06579.pdf.

[57] Note for example API, Article 82.

[58] Consider for example the UK Armed Forces Act 2006; consider also the Uniform Code of Military Justice for the United States which has the status of federal law enacted by Congress, its provisions being contained in United States Code, Title 10, Chap. 47.

[59] Muammar Gaddafi died on 20 October 2011. He had been hiding in a location to the west of Sirte, was captured by National Transitional Council forces and was killed shortly thereafter; see

not of course the kind of 'bringing to account' that is being referred to here. There are, furthermore, claims that aspects of Saddam Hussein's trial did not fully comply with the requirements of due process,[60] but in his case a trial did at least take place. Consider also the proceedings before ICTY against Slobodan Milošević,[61] against Radovan Karadzic[62] and against Ratko Mladic[63] and the prosecution before the Special Court of Sierra Leone of Charles Ghankay Taylor, former president of Liberia.[64] These proceedings and many others before national courts, the ad hoc tribunals and before the International Criminal Court demonstrate an increasing commitment by states that allegations of breaches of international law during armed conflict shall be properly investigated, tried and that those found guilty shall be appropriately punished. Clearly, not all violations of international law result in criminal proceedings against the perpetrators. The practical enforcement of the law has, nevertheless, improved significantly in recent decades.

There remains, however, a lot of room for improvement in enforcement. Despite the protected status that the law affords to civilians and despite the improvements in enforcement of the law referred to in the present section, civilian casualties and suffering in armed conflicts have, as we saw in Chap. 2, increased dramatically over the course of the last century. Greater effort must now be devoted to securing improved legal compliance by all involved in armed conflicts. The protected status of civilians must be converted from a rule to a practical, battlefield reality. The apparent targeting of civilians of the sort we have seen recently in Syria, using chemical and other weapons, so-called ethnic cleansing of the sort we have seen in Bosnia, Genocide such as was practiced in Rwanda and other military operations that involve grievous treatment of protected civilians are

(Footnote 59 continued)
McElroy 2012, available at www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9613394/Colonel-Gaddafi-died-after-being-stabbed-with-bayonet-says-report.html.

[60] Saddam Hussein was convicted and sentenced on 5 November 2006 by the Iraqi Special Court for crimes against humanity arising from the brutal repression of a Shi'ite town in the 1980s; Semple 2006, available at www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html?pagewanted=all&_r=0. As to suggestions that due process was not complied with, see Burns 2008, available at www.nytimes.com/2008/09/25/world/middleeast/25trial.html?pagewanted=all.

[61] See for example Sadat 2002 in ASIL Insights, available at www.asil.org/insigh90.cfm.

[62] See Corder 2009, available at http://articles.washingtonpost.com/2009-10-25/world/36820697_1_war-crimes-radovan-karadzic-bosnian-serb. Karadzic faces charges of genocide, war crimes and crimes against humanity arising from the Bosnian War, 1992–1995.

[63] See Borger 2012, available at www.guardian.co.uk/world/2012/may/16/ratko-mladic-war-crimes-trial-hague. Mladic faces charges alleging genocide, extermination, murder, inhumane acts and deportation arising from the Bosnian War, 1992–1995.

[64] See the database relating to the proceedings available at www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx. Charles Taylor was convicted on 25 April 2012 of 11 counts alleging war crimes committed during the armed conflict in Sierra Leone.

manifestly unlawful, are entirely unacceptable in the twenty-first century and must be stamped out as a matter of utmost international priority.[65]

As Marco Sassoli has pointed out, enforcement of the law against non-state actors is a continuing problem.

> While the rules on State responsibility are today considerably codified, the international responsibility of non-State actors remains largely uncharted waters. Even when rules apply to non-State actors or are claimed to apply to them, in most cases no international forum exists in which the individual victim, the injured state, an international inter-governmental or non-governmental organization, or a third State could invoke the responsibility of a non-State actor and obtain relief.[66]

This is clearly another matter that states should consider and address.

A legitimate question to consider is whether the emphasis on enforcement of liability against individuals has, to any extent, been at the expense of proper attention to the compliance by states with their legal obligations. Simplistically, breaches of the obligations of states are usually attributable to the acts of individuals, so in a sense enforcement at the level of those individuals will tend to contribute positively to compliance also by states. However, Volker Epping worries that today's emphasis on personal liability for war crimes will lead to the

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[65] Informed commentators have persuasively argued, however, that the mechanisms for securing respect for and for addressing violations of international humanitarian law are even less satisfactory and efficient than those relating to the implementation of other branches of international law; Sassoli et al. 2011, p. 354. They note twelve factors that are important here, namely that unlike the laws of physics, social rules can be and are broken; that breaches of IHL consist mostly of violent acts in a context of violence; that for there to be an armed conflict, the primary international legal and social regime of peace has been overruled; that many of those fighting in and suffering from armed conflicts are deprived of nearly everything that makes human life civilized; that with modern weapons people can be killed from great distance and without singling them out or even seeing them; that most of those fighting in contemporary armed conflicts lived before the conflict in an environment of injustice and of denial of fundamental rights; that the public and those likely to be engaged in armed conflict are often not trained in IHL; that knowledge of IHL is a necessary but not sufficient condition to ensure respect for it; that respect for IHL is impossible without basic discipline and organization or in a climate of blind obedience; that our societies are impregnated with the idea that rules are only valid if their violations are punished; that there will continue to be violations as long as cultures, ideas and ideologies of exclusion persist; and that in today's increasingly asymmetric conflicts both sides feel they cannot win without violating or reinterpreting IHL; Sassoli et al. 2011, pp. 437–439. These commentators correctly point out that the widening gap between the law's promises of protection and the perception that it is not respected in actual conflicts represents a major challenge for its implementation. While greater media and public attention should indeed be devoted to the very many instances of legal compliance during warfare, allegations that the law has been broken must be investigated promptly and thoroughly, prosecutions or disciplinary action must always be taken where indicated, and where the allegation of criminal conduct is found to be false that too must be publicized. Confidence in the law and compliance with the law will tend to go hand in hand with one another. If the metaphorical 'stick' consists of trial, punishment and public shame, the equally metaphorical 'carrot' should comprise informed, favourable reporting, public recognition, international respectability and, subject to other considerations, support where the law has demonstrably and consistently been applied.

[66] Sassoli 2010, p. 7.

undermining of notions of state responsibility.[67] An alternative interpretation would see proper investigation and adjudication of individual responsibility as a necessary practical precursor to meaningful attribution to states. After all, it is only when you know who did what, to whom, on whose orders or instructions and with what individual or collective military or other purpose that you can start to determine issues of state responsibility. The proper investigation at the individual level is liable to yield the evidence to base attribution at the state level; no investigation at the individual level may mean there is no basis for state attribution.

Responsible states adopt numerous measures to seek to ensure compliance by their armed forces with the law of armed conflict. Adopting formal procedures for the clearance of planned targets; issuing rules of engagement, maintaining the discipline of the force by enforcement of a disciplinary code; effective military training; the issuing of military manuals; the training of the armed forces in the law of armed conflict; the provision of legal advice at suitable levels of command; statutory provision to facilitate the conduct of disciplinary proceedings against members of the armed forces overseas on deployed operations; the acquisition and employment of precision weapons; the legal review of new weapons; and active involvement in the progressive development of the law are among the many activities by states that positively contribute to ensuring that the armed forces conduct their business in compliance with the law. These are therefore the activities that should be the focus of attention with states and armed groups whose armed forces have 'compliance issues'. It seems obvious that such states and armed groups should be helped to develop and implement these systems as by doing so they will become better able to control their armed forces and thus to ensure that military discipline is maintained within their armed forces and that future breaches of the law are kept to a minimum. States that are experienced in the activities listed in this paragraph can of course provide useful assistance, although it is recognized that some states will be sensitive as to from where such assistance should come, and there is likely also to be an important role for other agencies here.

The need for such action is however urgent. Only a few days before writing these lines, on 21 August 2013 it appears that a chemical substance caused serious loss of life and extensive injury, including among many children, during the Syrian War.[68] If a chemical weapon was used and civilians were the object of the attack a war crime will have been committed.[69] Serious breaches of the law arise too

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[67] Epping 2006, p. 7.

[68] Hubbard 2013, available at www.nytimes.com/2013/08/25/world/middleeast/syria-updates.html?_r=0.

[69] The use of chemical weapons is prohibited to states party to the Chemical Weapons Convention, 1993, by Article I. Syria is not a state party to that Convention; www.icrc.org viewed on 25 August 2013 (although activity with a view to achieving such participation is reportedly under way). However, in the author's view the prohibition of the use of chemical weapons has customary status and thus binds all states; see Boothby 2009, p. 138 and ICRC Customary Law

frequently in modern warfare and this would, as matters presently stand, seem to be only one of the more recent examples.[70] It is now clearly of vital and urgent importance that the principles and rules of the law of armed conflict must be disseminated as widely as possible and that all those involved in modern warfare must become motivated to learn the law and to comply with it. The author considers that achieving such compliance will involve a mixture of encouragement and enforcement, that it is the legal duty of all states under Article 1 common to the Geneva Conventions actively to support such processes and that it is in the interest of all those involved in the profession of arms and in wider society to do all they can to these ends.

12.3 Is the Purpose of War Changing?

Do the developments we have been discussing in this book cause us to change our view as to what war is all about? Earlier in this chapter, we referred to possible changes to the legal spectrum of conflict and we took into account doctrinal assessments of the strategic trends that are at work and of the resulting roles that the respective armed forces, sea, land and air, seem likely to have to fulfil. While some commentators wonder whether the division between the law relating, respectively, to international and non-international armed conflict continues to make sense,[71] we concluded that states will resist a complete merger of the two legal regimes because of their reluctance to accord combatant status to rebels. But evolution of weapons technology and the opportunities that it presents might seem to suggest that the very idea of warfare is changing. Are we moving towards a fundamentally different notion of what war signifies, what the purpose in engaging in it might be and does this have legal implications?[72]

As the archers lined up to fire their arrows at the Battle of Agincourt[73] in 1415, they had a very clear notion of what they were undertaking, of their personal and direct involvement in the fight, of the degree of personal risk that they faced and of

(Footnote 69 continued)
Study, pp. 261–262. Whether the substance involved in this incident was indeed a chemical weapon has yet to be definitively established. Similarly, it was not, at the time of writing, known which side in the conflict used the substance and whether civilians were the object of the attack or whether the attack breached the discrimination rule.

[70] As to the summary execution of Syrian Army prisoners by opposition fighters in September 2013, see Chivers 2013, available at www.nytimes.com/2013/09/05/world/middleeast/brutality-of-syrian-rebels-pose-dilemma-in-west.html?pagewanted=all&_r=0.

[71] Moir 2005, pp. 108–128.

[72] For a pessimistic view of the threats that emerging technologies including robotics, genetic engineering and nanotechnology present, particularly when in the hands of 'extreme individuals', see Joy 2007, pp. 21–22.

[73] Agincourt, one of the major battles during the Hundred Years War, took place on 25 October 1415.

the strategic significance for their country of what they were about to do. That, at least, is the impression that Shakespeare gives in his portrayal of relevant events in Henry V.[74] Certainly, the bow enabled them to engage their enemy from range at least some of the time, but the enterprise involved very considerable personal danger and a physical encounter that would sort out victor and vanquished by means of a direct and brutal armed engagement of military forces. The outcome of such battles tended, alone or in association with other military events, directly to determine the outcome of such a war. Moreover, armed hostilities involving hand to hand fighting, the direct application of physical and/or armed force, the use of the rifle, the pistol, the bayonet and the mortar, will continue to take place with distressing frequency and any notion we may have of the nature of future war must, as we have noted, take that reality fully into account.

Another reality to appreciate is that the generic circumstances giving rise to war in the future are likely to be similar to those we have seen in the past. Aggression, repressive dictatorship, territorial dispute, domestic political weakness, misunderstanding or miscalculation, racial, religious, tribal or group enmity, greed and unfairness in access to resources are among the many traditional causes that will continue to trigger the resort to arms.[75]

Other fundamentals will, it seems, also continue to apply. The purpose of warfare will remain the same, namely the subjection of the enemy to our will. The matters to which that 'will' relates may change somewhat over time, but it is the essential relationship between the use of military force and the consequent alteration in will that is the vital element. Seen from this perspective, the likely increase in direct participation by civilians in hostilities takes on a less vital perspective. The civilians are merely being used as an alternative, or more likely additional, medium through which to achieve the essentially military 'will-changing' effect. Their participation is not changing the very nature of the activity of war as such. It is merely a reflection of changing methods of war, a result of the use of certain technologies and a consequence of the quest by some states for fiscal economies.

What might cause the nature of future warfare to be altered in a doctrinally and legally significant way would be if the targeting of the enemy civilian leadership or civilian population were to become the preferred, widely adopted method for securing victory. The personal targeting of Saddam Hussein, for example, was entirely justifiable under current legal interpretations on the basis that he was a member of the Iraqi armed forces and thus a combatant. Even had he been a civilian, his role in directing the hostilities would have rendered him a legitimate object of attack as a directly participating civilian. The personal targeting of Slobodan Milošević during the Kosovo conflict, for example, would have been legitimate on the basis that he was the Supreme Commander of the Yugoslav

[74] Shakespeare 1599, Henri V, Act IV, Scene III; see in particular the St. Crispen's Day Speech.

[75] Consider also Hoffman 2007.

Army, that he chaired the Supreme Defence Council and that his activities in these capacities amounted to continuous direct participation in the hostilities.[76]

It would, however, be a matter for legal concern if the civilian, non-participating enemy leadership were to be regarded as a legitimate object of attack purely on the basis of its civilian, political leadership role. The law is currently constructed on the basis that strategic change of will is essentially achieved indirectly by attacking combatants, directly participating civilians and military objectives. If the doctrinal concept were to shift to a direct approach so as to favour direct attack on those civilians whose will it is sought to influence or change, this would indeed constitute the most radical change in the philosophy and nature of warfare. The discussion earlier in this book has shown that such a 'direct approach' would breach accepted, fundamental and intransgressible legal notions of distinction. That discussion, however, rather assumes that what states regard at the moment as a core principle of law will continue to be seen by them in the same way in the future.

The relatively novel feature that causes us to debate these issues is the technical ability to conduct accurate attack operations 'in the deep', i.e. deep within the geographical area controlled by the enemy. The possibly game changing ability to use cruise missiles[77] and unmanned platforms to attack specific targets at range[78] and with precision should not be under-estimated. It is now possible from a remote location and subject to the availability of accurate and timely target data, to put the enemy leadership at personal risk in a way that was not previously feasible.[79] The argument might therefore be that condemning untold thousands of relatively innocent armed forces personnel to an undeserved and needless death and causing endless unnecessary collateral damage in order to comply with the prevailing legal mores that insists on this 'indirect approach' to changing enemy will is illogical and seems likely to cause the maximum misery. Would it not be better directly to target the leadership whose evil schemes prompted the war in the first place; the suggestion would be that if you take out the leadership, you end the war early and with minimum shedding of relatively innocent blood.

At first glance, the argument appears appealing. Certainly almost all loss of life in warfare is a matter for the most profound regret. However, there is a fairly obvious flaw in what we have labelled the 'direct approach'. The will that must be

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[76] See Milošević and the chain of command in Kosovo, University of Essex Backgrounder, available at www.essex.ac.uk/armedcon/world/europe/south_east_europe/kosovo/KosovoMilosevicBckgrounder.pdf and see the indictment before the International Criminal Tribunal for the Former Yugoslavia (ICTY) of Milošević, available at www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.htm.

[77] Tomahawk Land Attack Missile, colloquially known as 'cruise missiles'.

[78] Consider the raid using 23 cruise missiles against the Iraqi Intelligence headquarters on 26 June 1993 discussed in Reisman 1994.

[79] This excludes, of course, the death in battle of King Richard III of England at the Battle of Bosworth Field on 22 August 1485; see Battle of Bosworth Field, available at www.wars-of-the-roses.com/content/battles/bosworth_field.htm.

influenced is often not, or not exclusively, the will of a small group of seemingly evil leaders. If the enemy leadership has successfully persuaded its population of the justice or appropriateness of its view or indeed is merely reflecting a popular will, attacking that will directly also implies the intentional and direct targeting of the enemy population at large. Targeting a population, whether one that has been led astray by a manipulative and evil leadership or one that has not, would be absolutely unacceptable on moral, legal and wider policy grounds. Moreover, targeting the civilian leadership may have the effect of galvanizing popular support and thus be counter-productive. Furthermore, there is no rational ethical or legal line that could be drawn between attacking a civilian non-participating leadership and targeting the civilian population.

So while technology can enable increasingly accurate remote targeting, attacks that have as their object the non-participating civilian leadership, the civilian objects that they own, civilians, the civilian population and civilian objects are, should be and will remain unlawful.

12.4 How Do Internal Security Operations Fit into This Mix?

The notion of 'internal security operations' encompasses a wide selection of situations. It should be remembered that quite a high threshold of sustained violence is required for a conflict to become a non-international armed conflict, and that if the organizational requirement is not satisfied by the armed group, hostilities above that high threshold of violence will also not constitute a non-international armed conflict. The result is that such conflicts falling outside the non-international armed conflict classification but occurring within the borders of a state will be regulated by domestic law supplemented by human rights law.[80] Indeed, any non-international conflict to which common Article 3 or Additional Protocol II do not apply will be regulated by domestic law supplemented by human rights law as to the nature and degree of force that may be used and the weapons that may be employed by organs of the state, e.g. the police force and the armed forces. The application of these bodies of law to such conflicts does not seem to be controversial. There may be controversy as to the classification of a particular conflict as

[80] The application of human rights law to such conflicts may be subject to derogation. The power to derogate would, however, only arise if, in the case of the European Convention, the situation could properly be described as a "public emergency threatening the life of the nation" and even then, derogation is only possible in respect of certain rights, as to which see Chap. 9. Informed commentators have, however, pointed out the importance of not undermining the purpose of linking Common Article 3's humanitarian mandate to *de facto* armed conflict. "That purpose is clear: to maximize applicability of humanitarian protections during conflicts that often involve a level of brutality that rivals if not exceeds that associated with inter-state conflicts"; Corn et al. 2012, p. 82.

armed or otherwise, but once classified as other than an armed conflict, the nature of the legal rules that must be complied with is relatively clear.

The so-called global war on terror has, however, posed challenges in this regard. While the Obama administration may have described the conflict differently, the issue that is material to the present discussion arises irrespective of the label that is applied. It is how to characterize military operations in pursuance of the transnational aspect of a non-international armed conflict, that element described in the literature as 'spill-over', for example, by US assets in Pakistan and Yemen. Future conflict seems likely to include similar ways of undertaking warfare in which an enemy takes advantage of modern communications and other technologies to prosecute a similarly coordinated yet diffuse campaign across borders, so achieving and maintaining a clear understanding of the law that applies is important.

The diffuse character of the group, or association of individuals undertaking the campaign is likely to preclude their characterization as an organized armed group.[81] This will certainly be the case for groups which, though they have some pre-eminent individual or individuals within the group or association, lack a responsible command. Accordingly, common Article 3 is unlikely to apply because, for a non-international armed conflict to exist, there must be relatively intense hostilities[82] and an organized armed group must be involved.[83] However, limiting the degree and nature of force that security forces can employ when they seek to prosecute high intensity hostilities in a situation that, owing to the non-organized nature of the armed group, does not amount to an armed conflict may severely impede their successful prosecution of such conflicts. Adhering to the right to life constraints, for example, may be difficult to achieve when a state is involved in high intensity and persistent lethal military operations against an adversary the structure of which precludes the classification of the conflict as 'armed'. That, nevertheless, is what current legal arrangements require and states must therefore comply with the restrictive norms.

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[81] Consider, for example, Perlroth 2012, available at http://bits.blogs.nytimes.com/2012/11/16/anonymous-steps-up-attacks-on-israeli-sites/?ref=anonymousinternetgroup.

[82] In *Prosecutor v. Ramush Haradinaj*, in assessing the 'intensity' criterion, the ICTY looked at how frequent, how many and how intense the military operations were, the nature of the weapons and military equipment employed, the number and caliber of munitions fired, how many persons and what kinds of forces fought, the number of casualties, the extent of property damage and the numbers of civilians that fled from the area of hostilities; *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber) 3 April 2008 at para 49.

[83] *Prosecutor v. Tadić* (Jurisdiction) (1995) 105 ILR 419, 488 and UK Manual, para 15.3.1; see also *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para 59.

12.5 Classification Challenges Posed by Future Conflict

War will continue to be about coercion. Perceived threats will in the future need to be neutralized in much the same way as in the past. As we saw in Chap. 2, the emerging phenomenon of transnational terrorism raises complex questions of classification. Indeed, the classification of transnational conflicts in general is at present unclear.[84] And yet, in this increasingly globalized era, they are the very type of conflict that seems likely to feature in the future.

Ensuring that all participation in future conflicts remains lawful throughout the conflict is, however, likely to be rendered even more challenging due to rapid change in the characteristics of a conflict over time. Mike Schmitt cites the examples of Iraq and Afghanistan: "where international armed conflicts morphed into non-international ones once the Baathist and Taliban governments were respectively ousted from power".[85] As he points out, the challenge lies in identifying when such 'vertically mixed' armed conflicts change in classification so that rules of engagement can be adjusted accordingly.[86] Of course, other factors may cause a change in classification over time. A situation that a state is choosing to characterize as consisting of criminal activities may change rapidly into an international armed conflict if the requisite, limited level of violence is met and if armed forces of another state become actively involved on the side of the rebels or criminal gangs.

Commanders and their forces will require great flexibility of approach combined with clear understanding of what the law permits and, respectively, prohibits in the differing circumstances that are liable to arise in future conflict. The differences in applicable law are and are likely to remain fundamental as between, for example, international armed conflict and internal security law enforcement situations. The killing of an adversary within the scope of combatant immunity in the former is frequently going to be murder in the latter circumstance. If a situation can change from international armed conflict to non-international armed conflict and then to law enforcement rapidly in both time and space, it would seem critically necessary that ways be found to harmonize as many features of the respective classes of law as possible, with a view to making it less difficult for those with the challenging task of undertaking military operations in this complex environment to do so consistently lawfully.

12.6 Some Suggested Conclusions

The extensive body of customary law dedicated to armed conflict issues, the fact that states have agreed a considerable body of treaty law on the same or related topics, the supporting writings of expert commentators and the decisions of

[84] Schmitt 2012, p. 469.

[85] Schmitt 2012, p. 470.

[86] Schmitt 2012, p. 471.

international and national courts and tribunals all lead to the inescapable and comforting conclusion that law will indeed regulate future conflicts. As Gary Solis observes, "[w]ar will always constitute suffering and personal tragedy, but rules of warfare are intended to prevent *unnecessary* suffering that brings little or no military advantage". Having charted the evolution in the nature of conflict during the twentieth and early twenty-first century, he wonders how the law of armed conflict is to be applied and enforced on non-battlefields where the very nature of war has changed, concluding that the law of war still 'works' but only through patient, intelligent and resolute effort by states willing to live by the rule of law.[87]

That, however, begs further questions, namely what law will be applied to armed conflict and will it be rational? These questions are linked. To be rational, to make sense to members of the armed forces and thus to be likely to be applied by them in practice, the law must strike a proper balance between humanitarian concern and military necessity.[88] The law that does this is the *lex specialis*, namely the law of armed conflict. The trends that we have discussed here might lead one to conclude that the law of armed conflict is in some danger. It remains to be seen whether the current understanding of the relationship between the law of armed conflict and human rights law will persist or be clarified. It is to be hoped that it will be so clarified that legal rules that are practical and appropriate for the particular circumstances of each class or type of conflict are applied.

It is an open question whether the increasing involvement of civilians in armed conflict that seems likely to occur will itself affect the application of human rights law in armed conflict. Some might argue that human rights law ought to be applied more widely because civilians are becoming more involved. That would seem, however, to be a fallacious argument. It is the nature of armed conflict and the particular pressures, dangers, opportunities, challenges and constraints associated with it that require the application of its dedicated legal norms. Those dedicated legal norms are grounded in a practical acceptance of the reality of war, and the realism of its principles caters, for example, for direct involvement of civilians in the fight and for the inevitable fact that warfare will involve casualties among the civilian population. The fact that there is legal disagreement as to the exact meaning of rules as to civilian participation is not relevant to this issue. The important point is that relevant rules exist and therefore should be applied to the situations for which the negotiating states designed them, however incompletely.

Time and the passage of as yet unknown future events will show whether applicable law will be appropriate to the circumstances of future conflict. The safest assumption is that the philosophy of future conflict will continue to be to secure an 'indirect effect', that is, to seek to influence the will of the opposing party to the conflict by attacking combatants, directly participating civilians and military

[87] Solis 2011, pp. 8 and 11.

[88] Note the final operative paragraph of the St Petersburg Declaration, 1868, and its reference to conciliating the necessities of war with the laws of humanity and see Dinstein 2010 pp. 4–6 and see Corn et al. 2012, pp. 114–119.

objectives. So-called decapitation operations against civilian leaders who do not directly participate will continue to be unlawful, and effects-based approaches to warfare will be legitimate only if the objects of attack are lawful targets. In short, the distinction principle will continue to constitute the benchmark of acceptability.

International manuals will continue to be written. They will seek to state the extant law and thus to render that law more accessible to all those whose task it is to comply with it. Obviously, this will be of particular value where the law is obscure or otherwise inaccessible. Whether they will inform future development of the law in the manner that the manuals of the second half of the nineteenth century arguably did for the 1899 and 1907 Hague Peace Conferences remains to be seen. Such manuals may at least help to 'point the way', and it is for states to decide whether to avail themselves of such assistance.

Remotely piloted attack operations are now mainstream and their lawfulness is rightly judged and discussed by reference to existing, well-established legal rules. There is no reason for a different yardstick of legitimacy to be applied to them. The use of cyber capabilities raises numerous issues which the international community may need to address. The Tallinn Manual has provided a logic for the application to cyber warfare of law of armed conflict norms. Whether states are convinced by the Tallinn Manual approach will become clear when states publicly declare their positions, either by means of generalized national statements or ad hoc in relation to particular future events.

Cyber deception operations may pose challenges for the law in the future, particularly if their use renders compliance with the distinction principle excessively difficult. Deception is a respectable and traditional implement in the toolbox of military commanders. The distinction between unlawful and lawful deception, referred to respectively in Article 37 paras (1) and (2) of API, would not seem to deal adequately with what emerging cyber technologies seem likely to facilitate. Possible solutions to this conundrum will require careful consideration. It may be necessary to limit any legal prohibition or restriction to the use during periods of armed conflict of computers with the explicit purposes of interfering with the enemy's targeting processes and thereby causing attacks to be directed at civilians, civilian objects or other persons or objects protected under the law of armed conflict. Necessarily, whether legal provision on the matter is deemed to be required at all, and if so the language in which it should be articulated are matters for states to decide.

Other developments in weapons technologies are likely to present further legal challenges of one sort or another. The law is, however, stated in commendably flexible terms which ought to enable it to withstand most foreseeable challenges.[89] It will again be for states to determine whether new technologies in the weapons field require *ad hoc* prohibition or restriction by way of treaty provision. Certainly, artificial learning intelligence technology, weapons manufactured using nanotechnology substances, weapons that are the product of genetics research and

[89] Stewart 2013, p. 180.

performance enhancing and performance diminishing substances are all examples of potential future weapons that may well cause concern justifying legal intervention in some form, or at least international discussion of the legal options.

The customary law requirement to conduct a legal review of all new weapons before they are fielded has the effect that states are required to satisfy themselves that novel weapons technologies comply with current legal norms before any decision is made to field such weapons. The relative paucity of states known to have systematic approaches to the implementation of this obligation will understandably cause some to wonder whether excessive reliance on Article 36 of API as the means for protecting the world against dangerous new weapons technologies is wise. It is clearly a priority that state compliance with Article 36 obligations be improved, and this is yet another example of the need to ensure proper adherence by states to their international law obligations.

Then there are the new technologies that may raise concerns not adequately addressed by current law. As we saw in Chap. 5, there have been suggestions that certain nanotechnology substances might straddle the division between the Biological Weapons Convention and Chemical Weapons Convention regimes. Treaty definitions, so critical to determining the scope of application of weapons law rules, can only realistically be formulated by reference to the technical understanding that exists at the time the treaty is negotiated. If that understanding so changes that the existing definitions fail to address a situation adequately and if humanity is placed at grave risk as a result, states should step in promptly and collectively to address the matter, if necessary by the urgent adoption of new treaty rules.

Ethical concerns will of course be raised in relation to a number of the technological developments referred to in this book. If ethicists are concerned by remotely piloted aircraft undertaking ground attack operations, they will really worry about autonomous attack. Some commentators put forward the argument that truly autonomous attack systems are unlawful, essentially for three reasons: first, that the fundamental rules of international humanitarian law require the application of judgment and discretion which robots do not and will not foreseeably possess; second, that if robots were to cross the sentient threshold to exercise human-like judgment and discretion while operating autonomously, they would have to be classed as combatants, would fail the international humanitarian law definition of a member of the armed forces and would thus be unlawful; and third, that irrespective of the foregoing, they fail a 'humanity and public conscience' test and should be prohibited on that ground.[90]

This analysis can however be rejected. As to the first ground, while the targeting rules in international humanitarian law are undoubtedly written in terms of what was at the time the norm, namely human action, there is no legal rule that would preclude the accomplishment of the required outcomes using mechanical means. As to the second ground, when equipped with smart sensors, artificial

[90] Akerson 2013, pp. 69–70.

intelligence or other sophisticated control mechanisms, an attack platform remains part of a weapon system that is being employed by those who initiated the military operation and should therefore continue to be legally categorized as such. As to the third ground, it will be for states to decide whether to prohibit such technology.

However, a vigorous debate among states linked to the legal review of such emerging autonomous technologies in which the factors that should be considered are discussed and clarified would be a most helpful development, not least because it would tend to inform the preparation of weapons reviews and may lead to a developing consensus on some, at least, of the relevant issues.[91] As the technology incrementally develops through degrees of automation towards genuine autonomy in attack, each such technical development will be examined by reference to the requirements of existing law. If the technology, or its application in relation to a particular weapon system, does not permit compliance with existing legal rules, the reviewing state is legally obliged not to field the weapon, or only to employ it in circumstances which are lawful for that state. Here again, the focus for compliance rests, inevitably and properly with states and with existing legal rules.

Technology in the field of automated and autonomous attack is likely to develop in ways that cannot easily be accurately foreseen. States would therefore be sensible to avoid negotiating prescriptive and restrictive legal norms at such an early stage in this process.[92] Furthermore, it seems likely that states will perceive that the increasing rapidity of new attack technologies that are not necessarily either automated or autonomous will necessitate the use of automated and, in due course, autonomous uses of force in response. Expert development of guidance as to the best practices to be applied when developing, evaluating, fielding and using autonomous systems, perhaps in the form of an International Manual of the sort discussed in Chap. 3 or some other similar 'soft law' text, would support the progressive articulation of norms that could be revised over time to take account of technological evolution. Devoting effort to these iterative activities is likely to be both productive and more coherent with the evolutionary development of the

[91] For an outline, and robust critique, of four objections to the development of autonomous attack technologies see Anderson and Waxman 2013, available at www.hoover.org/taskforces/national-security, pp. 14–18. The objections considered are that a machine will never be able to satisfy the fundamental legal and ethical principles required to field an autonomous lethal weapon; that it is simply wrong to take the human moral agent out of the firing loop; that autonomous weapon systems that do this are unacceptable because they undermine the prospect of holding anyone accountable for what, done by a human soldier, would be a war crime; and that removing human soldiers from risk and reducing harm to civilians diminishes the disincentive to resort to armed force.

[92] Peter Asaro makes just such a proposal. "As a matter of the preservation of human morality, dignity, justice, and law we cannot accept an automated system making the decision to take a human life. And we should respect this by prohibiting autonomous weapon systems"; Asaro 2012, p. 708.

technologies themselves than the negotiation of a treaty banning technologies that a number of states are likely to view as critical to their future security, a ban which they are therefore unlikely to support.[93]

If unexploded and abandoned remnants of war justified treaty provision under CCW,[94] nano-technological and other substances, if they are found to have sufficiently serious adverse effects on people and/or on the environment, ought to be considered suitable for specific legal provision. Indeed, there is an evident international concern about the impact of military operations on the environment. The Environmental Modification Convention or ENMOD, API, APII, Protocol II, Amended Protocol II and Protocol V to CCW, the Ottawa Convention and the Cluster Munitions Convention are all, to a greater or lesser extent, concerned with prevention and/or remediation of environmental damage or pollution caused by warfare. Tony Rogers draws attention to the growing interest among commentators, political leaders and others to these matters and to numerous calls for legal change. He concludes that

> there is already a respectable body of treaty law which, whether directly or indirectly, protects the environment. It may be that energy would be better directed in encouraging states to adhere to those instruments and reflecting them, and any 'soft law' instruments to which they had subscribed, in national law and military manuals, rather than in negotiating new, and in some cases somewhat fanciful, texts.[95]

There would appear to the author to be something fundamentally objectionable about messing with the opponent's genetic composition, and with attempts to adjust the ability of the enemy to perform ordinary tasks, particularly if such activity has anything other than the most short-term and mild effects. International dialogue on these matters, for example, within the framework of CCW, would help to clarify the legal issues and would demonstrate, or re-establish, the continuing relevance of that process. It may be that policing of future weapons technologies should not be left exclusively in the hands of states. International public policy may, it is suggested, dictate that technologies of such international concern as would equate to that felt in relation to chemical weapons should be made the subject of similar consultation, national implementation, verification and inspection regimes to those provided for in the Chemical Weapons Convention.[96]

While autonomous attack may become a reality sooner than some observers might wish, the computers and platforms so equipped will remain tools of warfare for which human beings are responsible. The scientists, programmers,

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[93] See Anderson and Waxman 2013, pp. 21–26.

[94] Conventional Weapons Convention, Protocol on Explosive Remnants of War, Protocol V, Geneva, 28 November 2003.

[95] Rogers 2012, pp. 235–237; Karen Hulme advocates the notion of an 'ecosystem approach' and suggests that a way forward might be to propose a soft law instrument; Hulme 2010, p. 160.

[96] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993. See in particular Article VII and the Annex on Implementation and Verification in relation, respectively, to Schedule 1, 2 and 3 chemicals.

commanders, planners and others who create the capability, who plan its use, who apply the relevant settings and who decide upon its use all have responsibility for their roles in the resulting operation. The autonomous character of some of the machinery should not be allowed to mask the important, indeed the essential human participation in the operation that involves its use. For the foreseeable future, legal responsibility issues arising from novel forms of attack will focus on the numerous human activities on which conducting them depends and on the human processes, human testing and human decisions leading to their acquisition, fielding and use.

As technology becomes ever more sophisticated, the divide between those who have access to the most modern science and those who do not is likely to become even wider. At the time of writing, that divide is already very large indeed. Some technologies may, because of more general access to them, somewhat redress the effect of this discrepancy, but only it is suggested to a limited degree. It seems likely that some parties to an armed conflict that are asymmetrically inferior in technological terms will continue to seek to redress the balance by resort to manifestly unlawful acts. Technological advance may affect the form that such unlawful activity takes. Nevertheless, states should, it is submitted, continue to strive to comply strictly with the law of armed conflict. The negotiation, signature and ratification of treaties in this field have undoubtedly been an important first step in this regard. However, it is only when, having ratified, states apply the new rules and enforce compliance by their own armed forces that practical progress will have been achieved.[97]

Detention operations will continue to be an essential element in the effective conduct of military campaigns. Recent experience suggests that states should devote time, effort and resource to ensuring that all personnel who are liable to become involved in any capacity in detention-related activities should be thoroughly trained in best practice and in the important legal rules that we have discussed in Chap. 8. It is vitally important that protected persons should be and should remain protected; moreover, the reputational and financial damage caused by legal proceedings, inquiries, convictions and news reports as to detainee mishandling can be of great strategic significance. It is therefore vitally important that states do everything possible to ensure that detainees are handled according to the very best practice, as to do otherwise will surely bring the force as a whole, as well as the relevant members of it, into grave disrepute.

States will grapple with all of the contradictions, controversies, ambiguities and challenges summarised in this chapter while subjected to the spotlight that the dazzling array of modern technology, of media outlets and of legal venues shine on every action that they, and their armed forces, take. In handling the media, the litigation, the inquiries and the other processes, absolute accuracy and honesty are going to be critical to maintaining credibility. But the law and those involved with it also have a clear responsibility to be fair. Therein lies an obvious conundrum.

[97] Watkin 2007, p. 283.

How can a law made by states be unfair to states? Perhaps the answer lies in the difficulty some states seem to have in adequately asserting and explaining their national positions before international courts.

It is, however, not states but ordinary members of the armed and police forces who put themselves in harm's way to maintain the safety and security of the rest of us. Governments, their officials, senior commanders,[98] members of the judiciary, politicians, academics, indeed anyone involved in any way in the legal arrangements concerning conflict in all its forms owe it to those armed forces and police personnel to recognize the dangerous and complex situations they must regularly face. All must strive to make the legal framework within which they must operate as logical, as clear, as balanced and as fair as possible; compliance with the law must be properly enforced and all breaches must be repressed.

While this book has revealed that the law of armed conflict would benefit from some updating in certain respects, its core principles and many of its rules apply equally to traditional and evolving methods of warfare. It is unique in reflecting within its rules a balance between military necessity and humanitarian concern, a balance that is critical to the acceptance by armed forces of the constraints that the law of armed conflict imposes on them. It is therefore vital that developing interpretations of the law continue to respect that central balance, so that members of the armed forces will accept the law as balanced and reasonable and will thus abide by it.

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[98] Consider here the duality of the responsibility of the commander. His responsibility under Article 87 of API in relation to persons under his command or control to prevent, suppress and report to the authorities breaches of the Conventions or Protocol; to achieve this commanders must, according to their level of responsibility, ensure that members of the armed forces under their command are aware of their obligations under the Conventions and the Protocol; API, Article 87(1) and (2). Secondly, commanders must ensure that their own actions do not breach rules of the law of armed conflict. For a discussion of these issues, see Corn et al. 2012, pp. 526–558.

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