The Grey Zone

Civilian Protection Between Human Rights and the Laws of War

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Introduction

MARK LATTIMER

THE INTERNATIONAL LAW of armed conflict developed over centuries primarily to regulate the conduct of war between polities or states; the law of human rights was developed mainly to place limits on how a given state could treat its own population. The contemporary face of war, however, is dominated by non-international armed conflicts (NIACs) fought between government forces and armed opposition groups—albeit often with extensive foreign support for either side—in a context where the national government is unable or unwilling to protect its own population. What happens to the civilian population caught in this grey zone between the traditional fields of application of human rights and the laws of war?

There is a rapidly growing number of cases where international courts and treaty-monitoring bodies are considering rules of the law of armed conflict or international humanitarian law (IHL)[1] side by side with rules of international human rights law (IHRL).[2] The assumption is that state obligations under both sets of laws may apply concurrently. In addition, there is increased acceptance that human rights obligations may also be held by non-state actors including, in the case of armed conflict, by armed opposition groups and by peacekeeping forces and officials of international and regional organisations.[3]

After 2001 these developments were further driven by the burgeoning jurisprudence in reaction to the policies and practices of the United States and its allies in the so-called 'War on Terror'—including the targeted killing

[1] The terms 'law of armed conflict' and 'international humanitarian law' (IHL) are used interchangeably in this volume to denote the *jus in bello*, the law governing the conduct of hostilities and the protection of civilians and those no longer participating in hostilities. IHL does not govern the recourse to war (*jus ad bellum*), which is considered in chapter 16.

[2] Classic instances include International Court of Justice: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168; and *Bamaca Velásquez v Guatemala* (Judgment) Inter-American Court of Human Rights Series C No 70 (25 November 2000). See below for illustrative cases before the European Court of Human Rights. See also United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) Art 38.

[3] For a summary, see A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006) 271–317.

of presumed terrorists and the indefinite detention of foreign fighters. But they also reflect broader developments in warfare. With the decline in the number and intensity of inter-state conflicts, intra-state or civil conflicts now present the predominant face of modern war. The shift of legal focus from inter-state relations to the domestic sphere has moved the conduct of war onto a terrain that is at once the traditional domain of the law of human rights and one where the rules of IHL have historically been less elaborated and the obligations less certain. At the same time, human rights campaigners confronted by states of emergency where the capacity or will of the state to ensure respect for human rights is lacking may look to applicable IHL rules to secure fundamental protections.

But in any given situation, which body of law will apply? If both are applicable, which set of rules holds precedence? Are there gaps in protection, where neither human rights law nor IHL appear to apply, or where states or other parties to conflict attempt to avoid obligations by looking for the least onerous law? In seeking answers to these questions this volume will focus on the effective protections, including legal remedies, available to the individual victim of violations. But it will also consider whether, despite the existence of overlapping bodies of law, structural obstacles exist which impede the development of an effective system of civilian rights protection in situations of armed conflict.

I. SCOPE OF APPLICATION

IHRL and IHL have developed separately, with their own sources in both customary and conventional international law. (A description of their evolution is outside the scope of this introduction, but it should be noted that the law of armed conflict is far older, dating back 2,500 years to Sun Tzu's *Art of War*.) Until the 1970s it was widely considered that IHRL and IHL were, if not mutually exclusive, then separate for practical purposes in that they generally applied to different subjects at different times.[4] IHL is now codified in the four 1949 Geneva Conventions and their 1977 Additional Protocols[5] as well as other multilateral instruments, providing binding

[4] See eg K Suter, 'An Enquiry Into the Meaning of the Phrase "Human Rights in Armed Conflicts"' (1976) 15 *Revue de Droit Penal Militaire et de Droit de la Guerre* 393.

[5] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV);

standards for the treatment of prisoners-of-war, the wounded, sick and others placed *hors de combat* as well as civilian populations in both international armed conflicts (IACs) and, in more limited respects, in NIACs. IHL does not apply outside of situations of armed conflict or occupation. On the other hand, human rights law, as laid out in numerous UN-sponsored treaties that followed on from the 1948 Universal Declaration of Human Rights, provides standards for protecting the rights of a state's own population and others within its jurisdiction, primarily in peacetime. An inner core of non-derogable rights does continue to apply in time of armed conflict, but at no time does the state owe human rights obligations to those outside its jurisdiction.

In practice, however, the situation is significantly more complex than that suggested above. A considerable literature already exists on the extraterritorial application of human rights in armed conflict situations,[6] but this is hardly the only area of contention in the mutual scope of application of IHRL and IHL. A more systematic listing of some of the main grey areas might attempt to cover questions not just over the territorial scope of application of the relevant branch of law, but also the personal and material scope of application. Questions regarding the territorial scope of application should include the application of human rights to territories/persons under effective control, and the application of human rights law and/or law of NIAC to cross-border rebels ('exported' civil conflicts) or to transnational armed groups. Regarding the personal scope of application, there arise questions over the extent of the obligations under IHL and human rights law of armed opposition groups, including national rebel groups, transnational armed groups, and peoples seeking self-determination; of third party states or foreign sponsors involved in a NIAC; and of peacekeeping forces and international or regional organisations. Finally, there are further questions regarding the threshold of violence triggering application of IHL and/or application of derogation powers under IHRL, and regarding the effect on IHL/human rights obligations of the qualification of conflicts as international or non-international, and the 'internationalisation' of internal conflicts through the involvement of foreign states.

Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I or AP I); Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II or AP II).

[6] This is the only applicability issue covered in any detail in the UN Sub-Commission's working paper on the relationship between IHRL and IHL; F Hampson and I Salama, 'Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law' (21 June 2005) UN Doc E/CN.4/Sub.2/2005/14. See also M Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford, Oxford University Press, 2011).

This is hardly an exhaustive list. A number of issues are grey areas in one body of law which have been commented on, sometimes extensively, by scholars in the relevant discipline, but where the implications for the mutual application of both disciplines are yet to be fully explored. For example, the application of the Geneva Conventions is only triggered once armed violence has reached a certain level of intensity and organisation, beyond 'internal disturbances' and 'sporadic acts of violence'.[7] But what is the relationship of either the violence threshold in common Article 3, or the higher threshold in Additional Protocol II, to provisions in human rights treaties which empower states to derogate from certain of their obligations in times of public emergency? The advantages of linking the thresholds and ensuring a continuity of some form of protection across the two branches of law should be obvious. In practice, however, states are generally reluctant to acknowledge the existence of an armed conflict on their territory (partly to avoid appearing to confer any form of legitimacy on rebel fighters), whereas they are often much quicker to invoke emergency powers.

All the issues listed above remain controversial. For example, while a number of states, including the USA,[8] reject the extra-territorial applicability of human rights, the European Court of Human Rights (ECtHR) has recognised its extra-territorial application in situations of occupation or 'effective control' over territory,[9] where persons are detained,[10] and where a level of control is combined with exercise of public powers,[11] although not in a case of aerial bombing.[12] The Inter-American Commission on Human Rights, on the other hand, has recognised an extra-territorial claim from the victims of aerial bombing even before effective control was established on the ground.[13]

II. RELATIONSHIP BETWEEN NORMS

Although they were designed to deal with very different situations, the core of IHRL and IHL both tend towards the same aim: protection of the fundamental integrity of the human person. To what extent, then, does it matter

[7] AP II, Art 1(2).

[8] See eg 'USA, Follow-Up Response to the Human Rights Committee by State Party' (2008) UN Doc CCPR/C/USA/CO/3/Rev.1/Add.1, 2–3.

[9] eg *Loizidou and Cyprus (intervening) v Turkey* (1997) 23 EHRR 513.

[10] eg *Issa and ors v Turkey* (2004) 41 EHRR 567; *Öcalan v Turkey* (App no 46221/99) ECHR 12 May 2005; *Al-Jedda v the United Kingdom* (App no 27021/08) ECHR 7 July 2011.

[11] *Al-Skeini and ors, Bar Human Rights Committee (intervening) and ors (intervening) v United Kingdom* (2011) 53 EHRR 18.

[12] *Banković and ors v Belgium and ors* (2007) 44 EHRR SE5.

[13] *Disabled Peoples' International v USA* (1987) Inter-American Commission on Human Rights Case No 9213.

which of the two applies to a particular situation, or that in an increasing number of situations both branches of law are recognised to apply?

For example, the Geneva Conventions' common Article 3, often described as a treaty in miniature, establishes minimum standards in non-international conflicts for the treatment of 'persons taking no active part in the hostilities', including the prohibition of violence to life and person, the prohibition of torture and cruel treatment, the prohibition of hostage-taking, the prohibition of discrimination, and fair trial guarantees. The list is similar to that provided in most human rights instruments for those personal integrity rights that cannot be derogated from in a state of emergency.

Marco Sassòli and Laura Olson thus conclude that where there is overlap between IHL and IHRL, 'both branches mostly lead to the same results'.[14] They go on, however, to draw attention to two crucial questions where 'not only is the relationship between the two branches unclear, but also the answer of humanitarian law alone': admissible killing and the internment of fighters.[15] Sassoli and Olson's focus is on non-international conflicts, where practical problems are most likely to arise, but consideration of these two issues generally in IHRL and IHL shows not just a lack of clarity but the existence of a conflict in the application of norms.

Although in human rights law the right to life is not absolute, the use of deadly force by law enforcement officers is strictly circumscribed. The force used must be 'no more than absolutely necessary', it must be directed towards a legitimate aim such as to defend others from unlawful violence or to effect a lawful arrest, and it must be proportionate to that aim.[16] In contrast, 'the starting point of … IHL is the soldier's right to kill'.[17] Whereas human rights standards generally require a clear warning to be given of the intention to use firearms,[18] it is perfectly legal under IHL for combatants to be bombed in their beds.

If we compare the human rights standards governing detention of criminal suspects with the security detention of combatants in IAC, the differences in approach are similarly stark. Under IHRL the detention of suspects needs to be subject to judicial review and any sentence of imprisonment imposed by a properly constituted court. Under IHL prisoners of war can be

[14] M Sassòli and LM Olson, 'The Relationship Between International Humanitarian Law and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 871, 600.

[15] ibid, 601.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos 11 and 14, 4 November 1950) ETS 5 (ECHR), Art 2(2).

[17] Hampson and Salama (n 6) 13.

[18] United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990) para 10.

interned indefinitely (ie without recourse to a judge), but need to be released (and repatriated) without delay once active hostilities have ceased.[19]

In fact, admissible killing and the detention of suspects/fighters are such central questions for both IHL and IHRL that the differences in approach give rise to a whole set of further spiralling issues. In NIACs, should members of rebel armed groups benefit from human rights protections limiting killing when they are not actively or directly participating in hostilities?[20] If rebel fighters in non-international conflicts are subject to attack under IHL rules, should civilians in their vicinity also be protected under IHL rules prohibiting indiscriminate or disproportionate attacks or under IHRL rules governing the proportionate use of force? (ie which proportionality test is applicable?) Should every killing involving the use of force by state agents warrant an investigation (as required by IHRL) or only where a possible IHL violation has occurred?

To decide which body of law should be determinative when both are in play, the International Court of Justice (ICJ) has referred to the doctrine of *lex specialis*, first in the *Nuclear Weapons* Advisory Opinion and then in the *Wall* Advisory Opinion, where it stated that: '[T]he Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.'[21]

The maxim *lex specialis derogat legi generali* provides that a more specialised law, specifically addressing the subject matter at hand, takes precedence over more general laws. Exactly how the ICJ intended this maxim to apply was not explained in the judgments and has been the subject of some scholarly debate. It is clear from the context, however, that the ICJ did not envisage IHL, as the *lex specialis*, displacing IHRL as a whole during armed conflict. Rather it suggests that the general rules of human rights, applicable at all times, would need to be interpreted at times of armed conflict in light of the more specialised rules of IHL specific to that context. The prohibition on arbitrary killing under IHRL, for example, would continue to apply, but the assessment of what was meant by 'arbitrary' in the context of armed conflict would be interpreted in the light of IHL principles on distinction, military necessity and proportionality.

[19] GCIII, Arts 118–19.

[20] For the notion of direct participation in hostilities, see N Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 *International Review of the Red Cross* 991. But see also K Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *New York University Journal of International Law and Politics* 3.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 2) para 106.

UN human rights bodies, for their part, have noted the application of *lex specialis* while seeking to emphasise 'that human rights and humanitarian law are complementary and mutually reinforcing'.[22] Both IHRL and IHL practitioners have subsequently promoted a range of approaches which seek to articulate both branches on a case-by-case or rule-by-rule basis, filling perceived gaps or resolving uncertainties in one branch by recourse to a more detailed or specialised rule in the other branch. Crucially this appears to recognise that, in some cases, human rights law may constitute the *lex specialis*. Thus Louise Doswald-Beck (giving the human right to life as an example):

> [W]here there is any kind of doubt, or where the [IHL] rules are too general to provide all the answers, then human rights law will fill the gap, provided that this law is not incompatible with the overall fundamental aim and purpose of IHL.[23]

In her view, 'any law needs to be interpreted in the light of the aim and purpose of that law'.[24] Sassòli and Olson similarly remark that 'when formal standards do not indicate a clear result, the teleological criterion must weigh in, even though it allows for personal preferences'.[25]

Although such approaches may be attractive from a humanitarian point of view, they nonetheless give rise to problems of consistency, not least because other parties' views of the aims and purposes of international law may differ. Why, for example, should human rights advocates be able to pick and choose from provisions of IHL and IHRL, when they criticise the USA for its own selective or hybrid approach in targeting foreign fighters/terrorists and detaining them in Guantánamo without according them the corresponding protections under international law?

But perhaps the more fundamental problem arises from the fact that IHL in particular depends for its implementation on the need to provide combatants in advance with clear instructions as to what is and is not permissible. Any approach which depends on the post-hoc interpretation of complex and overlapping bodies of law by international lawyers may be workable for controlling violations caused by decisions of administrative bodies, but is unlikely to result in clear rules of engagement for combatants that will withstand the stress of battle.

[22] UN Commission on Human Rights Res 2005/63 (20 April 2005) UN Doc E/CN.4/RES/2005/63. See also UN Human Rights Committee, 'General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant'(26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 11.

[23] L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 864 *International Review of the Red Cross*, 903.

[24] ibid.

[25] Sassòli and Olson (n 14) 604.

III. IMPLEMENTATION AND AVAILABILITY OF REMEDIES

It has become commonplace to remark on the relative weakness of the enforcement regime for IHL compared to IHRL (although such statements sometimes overestimate the effectiveness of the latter). But it is important to recognise that the system of implementation or enforcement of each is very different.

Human rights law is mainly implemented through civil law (including public law) remedies at the national level, overseen by a range of international intergovernmental mechanisms, including human rights courts and monitoring bodies. IHL is also designed to be implemented mainly at the national level, but through the criminal law, whether courts martial or the ordinary criminal law of the state concerned. But here, as Timothy McCormack points out, 'the disparity between perpetration and prosecution is staggering'.[26] Even leaving aside technical questions such as the higher burden of proof in criminal cases and, in IACs, the extra-territorial collection of evidence, states have shown a great reluctance to prosecute members of their own armed forces.

In practice, then, where IHL binds it has mostly been through self-restraint. Adherence to IHL is clearly encouraged by the international law principle of reciprocity, but does not depend on it.[27] (Note in addition that, under the four Geneva Conventions and Additional Protocol I, most forms of belligerent reprisal are now outlawed.)

The most significant international contribution to the enforcement of IHL in recent decades has been the establishment of international criminal tribunals. International criminal law draws on both IHL and IHRL, with some particular sources of its own, including the London Charter of the International Military Tribunal at Nuremberg.[28] The detailed codification of war crimes in non-international conflicts, describing conduct which if carried out by government forces would also constitute gross human rights violations, has gone some way to addressing the problems noted above.[29] The Rome Statute of the International Criminal Court (ICC) also introduced a number of important innovations with regard to victims' rights. Victims of crimes cannot refer a matter directly to the Court, but they and/or NGOs can communicate information to the Prosecutor who can initiate

[26] T McCormack, 'Their Atrocities and Our Misdemeanours: the Reticence of States to Try their Own Nationals for International Crimes' in M Lattimer and P Sands (eds), *Justice for Crimes Against Humanity* (Oxford, Hart Publishing, 2003) 108.

[27] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 231.

[28] For a summary, see Lattimer and Sands (n 26) 3–5.

[29] See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9 (ICC Statute), Art 8(c)–(e).

an investigation on the basis of information received.[30] Victims can also be represented at trials and have the right to seek reparations. But it is perhaps still too early to assess the impact of international criminal justice, and the length and expense of international trials mean that only a small number of cases will ever be heard at the ICC.

Meanwhile, the wider availability of IHRL mechanisms at both UN and regional level and the growth of rights of individual petition have led to an expansion of human rights approaches and remedies in armed conflict situations. Of particular note are the large number of cases, including those dealing with conflicts in Chechnya, Turkey and Iraq, decided by the ECtHR. The Court does not directly apply IHL but rather has developed an approach to applying the law of the European Convention on Human Rights to armed conflict situations that in respect of civilians is not inconsistent with IHL.[31]

In terms of the mutual implementation of IHL and IHRL, then, one could describe a similar effect to that which we saw in terms of norms above, with a gap or vacuum in one branch drawing in remedies from the other branch. Two further initiatives should be mentioned in this context. In a major study the International Committee of the Red Cross identified at least 136 rules of customary humanitarian law that applied to NIAC. In many cases the state practice cited showed states applying rules of international conflict to civil conflicts by analogy, although notably decisions of human rights bodies were also cited.[32]

The other initiative is the process to draw up a UN declaration of 'fundamental standards of humanity'. This arose out of the 1990 Turku Declaration on Minimum Humanitarian Standards, itself an attempt to address the perceived gap in protection identified above in situations of 'internal disturbances' or low-intensity violence.[33] But the UN process has stalled, meeting both a lukewarm response from states and a distinct lack of enthusiasm from human rights campaigners and IHL practitioners, who variously feared the watering down of existing standards or compromising the separate integrity of IHL and IHRL, with their distinct aims.[34]

The argument could be made that even to speak of *gaps* in protection is potentially dangerous, because it can lead states to believe that certain constraints on their action do not exist, when in fact such constraints could

[30] ibid, Art 15.

[31] See eg *Isayeva v Russia* (App no 57950/00) ECHR 24 February 2005. See also W Abresh, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) Center for Human Rights and Global Justice Working Paper No 4.

[32] See JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, Vol I: *Rules* (Cambridge, Cambridge University Press, 2006).

[33] Declaration of Minimum Humanitarian Standards (3 March 1995) UN Doc E/CN.4/1995/116 (Declaration of Turku).

[34] See E Crawford, 'Road to Nowhere? The Future for a Declaration on Fundamental Standards of Humanity' (January 2012) Legal Studies Research Paper No 12/02.

be found in one or other branch of law. The need to focus on implementation rather than additional standards-setting is no more obvious than in the current Syrian conflict, where the overwhelming issue is not identifying the applicable law but rather that both IHL and IHRL are being blatantly flouted with, up to now, almost complete impunity.

But many of the controversies outlined above show no signs of abating and the grey areas seem only to be expanding. This is partly because of innovations in warfare, whether technical (eg the use of unmanned combat air vehicles—drones—to carry out targeting killings), organisational (eg the growth of transnational non-state armed groups such as al-Qaeda and ISIS), or legal (eg the classification by the United States of its adversaries as 'unlawful enemy combatants'). Meanwhile an effective system of accessible remedies, including for civilian victims, remains ever elusive.

IV. RIGHTS, REMEDIES AND DEVELOPMENTS

This introduction has sought to outline a range of boundary issues in IHRL and IHL covering competing norms, mutual scopes of application and implementation, and availability of remedies. The chapters in this volume look critically at such boundary issues and at areas of uncertainty in the application of IHL and/or the law of human rights in order to bring new perspectives to the rights of civilians, and to the remedies available for violations, and to assess emerging legal developments with a potential impact on civilian protection.

The principle of distinction—the obligation to distinguish at all times between civilians, or civilian objects, and military objectives, and to direct attacks only against the latter—is both the bedrock of IHL and the starting point for understanding civilian rights. It requires, naturally, a clear appreciation of who is, and is not, a civilian. But in certain crucial respects this understanding is not settled, as Emily Crawford explains in the first chapter. To the practical challenges presented by irregular armed forces often merging with the civilian population are joined a number of legal questions. If civilians lose their immunity from attack when directly participating in hostilities, how is direct participation defined and how long does it last? What of the driver, the cook or the fund-raiser (or, for that matter, the lawyer) and members of armed opposition groups who do not engage in combat? Crawford critically reviews the extant treaty law, state practice and some recent attempts to provide authoritative guidance, including the introduction by the International Committee of the Red Cross (ICRC) of the notion of 'continuous combat function' to delimit those members of opposition groups in a NIAC who become targetable on account of their membership. However, the continuing uncertainty around membership of armed opposition groups in particular, as well as the scope of direct participation

in hostilities, benefits neither state parties to conflict nor civilians, and Crawford ends with a plea for greater clarity.

Few practices have a greater tendency to undermine the application of IHL than the refusal to investigate or even acknowledge civilian casualties. In chapter 2, Mark Lattimer considers the wide-ranging positive duties in international law to investigate civilian deaths. In locating many such duties in the law of the Geneva Conventions and in customary IHL, he argues that the obligation to investigate does not depend on the availability of a human rights jurisdiction, and is binding on both state parties and non-state parties to conflict. An important section of the duty to investigate is governed by one of the few civilian protections in IHL explicitly formulated in terms of rights, namely 'the right of families to know the fate of their relatives'.[35]

After the principle of distinction, the principle of proportionality is essential to an understanding of the legal limits on military action. If the law of armed conflict is fundamentally concerned with the balance between military necessity and humanitarian considerations, then the principle of proportionality provides a description of the calibration point. As Amichai Cohen notes in chapter 3, however, an agreed measure for calculating what is proportionate and what is disproportionate has yet to be found—and is unlikely ever to be found. Looking in particular at the way in which the principle of proportionality is interpreted in the context of targeted killing operations, he instead suggests that it is the prominence accorded to procedures—legal, bureaucratic—in the application of the principle which has modified the interpretation of proportionality in the practice of leading states in modern asymmetrical conflicts.

The evolution of weapons systems has both led to frequent claims that 'surgical' attacks are now possible which enable better adherence to the IHL principles of distinction and proportionality and at the same time given rise to new concerns over compatibility with international law. Perhaps no development has occasioned more controversy than the deployment of 'unmanned combat aerial vehicles' or armed drones. First put into operation by the USA under President George W Bush, their use was significantly expanded during the Obama administration and has now spread more widely (even ISIS has experimented with armed drones in Iraq). Stuary Casey-Maslen raises general concerns over the development of both unmanned and autonomous weapons systems but identifies the area of greatest current legal concern as the use of armed drones to attack targets outside the area of active hostilities. He argues that any such attacks should conform to the applicable legal regime governing law enforcement, rather than the law governing the conduct of hostilities. Targeted killings outside the conduct of hostilities which then ignore law enforcement rules might be more properly characterised as assassinations.

[35] AP I, Art 32.

The increase in the transnational use of force against non-state armed groups has led to claims of the existence of a transnational or even global NIAC. This concept and related conflict classification issues are placed under critical scrutiny by Pavle Kilibarda and Gloria Gaggioli in the context of a typology of NIACs. While recognising that a NIAC may take place on the territory of more than one state, they point out that the contemporary practice of distinguishing between international and non-international conflicts solely on the basis of the state or non-state identity of the parties can produce unfortunate outcomes, not least for civilian protection. They argue in favour of the limited revival of a territorial criterion in defining the scope of application of NIAC rules in order to avoid the application of rules of armed conflict in peacetime situations for which they were not designed and for which other legal protection regimes are better suited.

Civilians suspected of directly participating in hostilities or otherwise deemed to pose a threat are detained without charge or trial in NIACs across the world. But under what authority? Françoise Hampson begins by considering the justification for a system of administrative detention or internment in NIAC—and the potential consequences if one is not available. While the authority to intern may be available to the territorial state by virtue of domestic law—within the limits stipulated by human rights standards—such authority is less certain under international law, placing in question the practice of detention by foreign states involved in NIACs, including those operating under a multinational mandate. Reviewing recent jurisprudence from the English courts and the ECtHR, she suggests ways forward for states to clarify customary IHL on detention in NIACs, including the need for a detention review mechanism and procedural guarantees.

The existence not just of overlapping branches of law but also both military and ordinary (civilian) criminal justice systems further complicates the protection of civilians (and the rights of both victims and the accused). This is particularly the case with regard to rape and sexual violence, as Lois Moore and Christine Chinkin explain. While courts martial remain the appropriate forum for trying offences of military discipline, since the operation of the international military tribunals at Nuremberg and Tokyo there has been a move away from applying military justice systems to crimes under international law, including those committed in armed conflict. In general, military tribunals have been slow to prosecute personnel for IHL breaches, particularly senior officers, despite recognising the concept of command responsibility. This undermines the incentives on superior officers to ensure compliance, detracting from IHL's ability to protect civilians from sexual violence. Moore and Chinkin conclude that while there are real advantages in national as well as international prosecutions for sexual violence being made for war crimes and crimes against humanity rather than 'ordinary' domestic crimes—not least the increased stigma that a conviction may attract—primary responsibility for prosecution should rest with the ordinary civilian criminal justice system. They finish with a number of

recommendations to improve state compliance with international obligations to suppress sexual violence in armed conflict.

Part II of this book considers the availability of remedies for civilians whose rights have been violated. From its various origins in damages payments made by a defeated party after an armed conflict and in the human rights law right to a remedy, the notion of a right to reparation for victims of armed conflict has progressively become accepted as a matter of international law, as Carla Ferstman notes. She discusses both the procedural component of the right, the access to a remedy and the substantive component, which may entail any combination of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. While the required standard, as first articulated by the Permanent Court of International Justice, is 'full' reparation—wiping out the consequences of the violation and re-establishing as far as possible the situation before the breach—the practice of states when confronted by widespread loss and destruction is piecemeal, leaving victims struggling to assert their rights.

On the procedural side, Ferstman notes that whereas there is an obligation to afford reparations, there is no independent IHL right for victims to *claim* reparations. So how do national courts deal with claims from victims of alleged violations of IHL? The question is particularly significant given the weakness of IHL implementation mechanisms at the international level, including the absence of an individual complaint mechanism. Sharon Weill constructs a typology of roles to characterise the response of national courts to the challenge of adjudicating such claims, ranging from the role of apologist for the national state to a utopian role seeking to implement international law norms against the grain of national legislation. Citing jurisprudence from Israel, the USA, the UK and Spain, she describes how courts may also avoid jurisdiction, or defer to the executive branch, but suggests that performing a limiting or normative role enables national courts to fulfil most closely the function of the judicial branch in upholding the rule of law.

Given the lack of mechanisms for obtaining individual remedies under IHL, it is the regional human rights mechanisms that have developed most of the international jurisprudence concerning the protection of the rights of civilians in armed conflict. Since the dictum of the ICJ in the *Nuclear Weapons* case describing IHL as *lex specialis*, the human rights courts have had two decades to chew over the relationship between IHL and IHRL. Noting the very different origins of the two branches of law, Bill Bowring reviews cases before the Inter-American Commission and Court of Human Rights, the ECtHR, and the recommendations of the African Commission on Human and Peoples' Rights, and finds IHL being used as an interpretive tool or as a test for arbitrariness, but always in a role subsidiary to the purpose of establishing whether or not a violation of the relevant human rights convention has occurred. He asks whether the *lex specialis* rule has, in this context, finally been laid to rest. He quotes the African Commission statement that '[a]ny violation of IHL resulting in death, including war crimes,

will be an arbitrary deprivation of life', and finds that this approach will strengthen the enforcement of victims' rights for both IHL and human rights violations in armed conflict.

As regional human rights courts underscore the continued application of human rights obligations during armed conflict, few legal issues have proved more contentious than the extra-territorial application of those obligations. The ECtHR, in particular, has struggled to find a satisfactory formulation for when human rights law applies extra-territorially since its problematic decision in 2011 in *Banković*. Cedric Ryngaert undertakes a critique of the main existing approaches to the extra-territorial application of human rights, including those that make such application dependent on a state exercising effective control (either over territory or persons). Instead, he proposes approximating extra-territorial human rights obligations with the notion of state responsibility under general international law.

The expansion of UN and other intergovernmental peacekeeping operations around the world has led to numerous situations where international peacekeeping forces become the first line of protection for threatened civilians. How effective that protection is in practice may depend on a range of factors, including the terms of the relevant mandate and the conditions on the ground, as well as whether the job is done well. But what duties do peacekeepers owe civilians? To answer this question, Liesbeth Zegveld draws on her extensive experience before the Dutch court litigating the *Nuhanović* case, which concerned the acts and omissions of a Dutch battalion of UN peacekeepers in the 'safe area' at Srebrenica during the Bosnian war. Given the very wide immunity enjoyed by the UN, a central issue in the case was whether the Netherlands could be held liable for Dutchbat's decision to send Hasan Nuhanović's family away from the UN compound (effectively to their deaths). In finding that it could, and raising the possibility of dual attribution of responsibility between the UN and the troop-contributing state, the case enhanced the access of victims to reparation.

Although the development of remote, autonomous and other new weapons technologies is a focus of the recent IHL literature on weapons, the vast majority of violent civilian deaths in contemporary conflicts are the result of attacks using conventional weapons. The entry into force of the Arms Trade Treaty in 2014 offered new hope to limit the human suffering caused by the $70 billion annual international trade in conventional weapons. But what protections does the Treaty offer in practice to civilians in conflict zones and what enforcement mechanisms does it provide to secure those protections and to hold states to account for their undertakings in relation to arms control? Blinne Ní Ghrálaigh analyses in detail the new state obligations contained at the heart of the Treaty in Articles 6 and 7. She concludes that measures to enforce national laws and regulations implementing the Treaty's provisions, including the scrutiny of national courts, are key to the effectiveness of the Treaty in practice, and considers how its protections have fared in the first litigation under the Treaty, a case before the English

court concerning weapons exported from the UK to Saudi Arabia that were used to commit violations of international law in the war in Yemen.

In Part III we turn to the development of new mechanisms or international legislation to secure the implementation of IHL and human rights law in armed conflicts. Valentin Zellweger and François Voeffray describe first the deficiencies in the existing implementation mechanisms established under the IHL treaties, before describing the diplomatic process facilitated by the ICRC and the government of Switzerland to promote implementation by establishing a dedicated intergovernmental forum for IHL. Compliance mechanisms integrated into the 1949 Geneva Conventions, including the institution of protecting powers and the conciliation and enquiry procedures, as well as the International Humanitarian Fact-Finding Commission established under Additional Protocol I, have rarely if ever been used in recent decades. This is due to a number of factors, including the requirement to obtain the consent of the parties to the conflict and the fact that they were not designed for the complexity and proliferation of actors that characterise contemporary NIACs in particular. The need to anchor compliance in a broader institutional structure is what has driven the ongoing diplomatic process to create a forum of states to enhance IHL implementation.

In chapter 15, Jennifer Welsh explains that the 'responsibility to protect' (R2P) establishes a series of international political commitments to protect populations from atrocity besides the legal mechanisms for civilian protection explored elsewhere in this book. However, the R2P norms, as encapsulated in the outcome document from the 2005 UN World Summit,[36] arguably follow a state-centric model of atrocity prevention, whereas civilians are increasingly at risk from non-state armed groups (NSAGs). Professor Welsh, until recently the UN Special Adviser to the Secretary-General on the Responsibility to Protect, analyses the concept of R2P in relation to the threat posed by such groups, noting that the category covers a wide array of actors from those pushing for governmental reform to those seeking the creation of a new territorial or political order. She seeks to clarify some of the legal dilemmas around international support for NSAGs and the states fighting them, concluding that the role and function of R2P should and can extend to the threat posed by NSAG perpetrators of atrocity crimes.

The last two chapters consider innovations in international criminal law that have the potential to strengthen civilian protection. Quite apart from the active implementation of human rights and the *jus in bello*, it is the prohibition and prevention of armed conflict itself which perhaps holds the greatest promise for preventing harm to civilians. Carrie McDougall looks at the most serious forms of the illegal use of inter-state force: the crime of aggression. She critically reviews the main objections—including those of

[36] UNGA, '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1, paras 138–39.

the five permanent members of the UN Security Council—to current developments bringing the crime within the jurisdiction of the ICC. These include concerns over the definition of the crime and the provisions for engaging jurisdiction, as well as wider questions over the impact on international peace and security. Given that the aggression amendments to the ICC Statute provide states parties to the Statute with the opportunity to lodge an 'opt-out' declaration, she concludes that the concerns are overblown and that the effective criminalisation of aggression has the potential to deter the most serious forms of the illegal use of force and thereby to prevent the deaths of countless victims.

The protection of civilians from attack is central not only to IHL but also to the international law on crimes against humanity and genocide (crimes which, it should be recalled, can also be committed outside of an armed conflict). Leila Nadya Sadat sketches the legal development of crimes against humanity from their early codification at Nuremberg to their definition in the ICC Statute as murder or other specific acts committed as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Unlike the crime of genocide, however, crimes against humanity are not covered by a standalone convention aimed at their prevention and punishment. Professor Sadat describes the work of the Crimes Against Humanity Initiative and, more recently, that of the International Law Commission to draft such a convention, arguing that it could close significant gaps in the legal suppression of these egregious crimes against civilian populations.

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From these varied contributions, coming from both the IHL and human rights traditions, can we discern the beginnings of a practice of civilian rights? It is notable that today's conflicts evidence not just the failure to implement basic humanitarian norms but also deliberate attempts by states and other parties to conflict to avoid legal interdictions through such strategies as the widespread use of proxy militias, lack of transparency concerning the investigation and recording of civilian casualties, and the over-application of certain IHL concepts or rules to situations they were never designed to address. Contending with these trends, however, there is a new confidence by human rights bodies and mechanisms to assert their competence in situations of armed conflict and a growing legal activism seeking reparation for IHL violations at the suit of civilian victims. If, forty years after the conclusion of the Additional Protocols to the Geneva Conventions, we still seem far from the operation of an effective system of civilian protection, there is nonetheless a widening realisation that the failure to spare the civilian population in armed conflict has legal consequences and that what begins in the command centre may well end up in court.